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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1884.

No. ~~542.~~ 250 17

THE VICKSBURG AND MERIDIAN RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

ISRAEL PUTNAM.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF GEORGIA.

FILED APRIL 2, 1883.

CAMBRIDGE 04163

SUPREME COURT OF THE UNITED STATES.

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INDEX.

	Original.	Print.
Caption	1	1
Transcript from city court of Atlanta	1	1
Affidavit for attachment	1	1
Bond for attachment	2	1
Attachment	3	2
Sheriff's return	4	2
Answer of garnishee	4	2
Declaration in attachment	6	3
Plea of defendant	8	4
Petition for removal to C. C. U. S.	9	5
Bond for removal to C. C. U. S.	10	5
Amendment to declaration	12	6
Order for removal to C. C. U. S.	12	6
Clerk's certificate	13	7
Amenment to declaration	13	7
Charge of the court	14	7
Verdict of jury	29	7
Judgment	30	14
Answer to garnishment by A. & W. Pt. R. R. Co.	30	14
Motion for new trial	32	15
Proof of service of motion	34	16
Order overruling motion for new trial	34	16
Bill of exceptions	34	16
Testimony of Israel Putman	35	16
General Lewis	40	19

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	Original.	Print.
"Expectation" table	41	20
Testimony of Dr. Willis Westmoreland	42	22
C. R. Carrington	44	22
—— Atwater	46	23
Supt's report to directors	48	24
Testimony of Grant Wilkins	49	25
R. H. Smith	50	25
Diagram	59	28
Testimony of Mayson Herbert	60	29
R. H. Garrett	60	29
E. F. Raworth	61	29
Charge of jury	65	31
Petition for writ of error	71	34
Order allowing writ of error	72	34
Writ of error	73	34
Bond	75	35
Citation	77	36
Proof of service	78	37
Clerk's certificate	79	37

1 *Record.*

ISRAEL PUTNAM
vs.
THE VICKSBURG AND MERIDIAN RAILROAD COMPANY.

Attachment—City court of Atlanta.

Removed to U. S. circuit court, northern district of Georgia.

Be it remembered that on the 13th day of March, 1883, there was filed in the clerk's office of the United States circuit court in and for the northern district of Georgia the record in above-stated case, removed from the city court of Atlanta, Georgia, in words and figures following, to wit:

Affidavit.

Attachment—City Court of Atlanta. June Term, 1882.

ISRAEL PUTNAM
vs.
VICKSBURG AND MERIDIAN R. R. Co. } No. 64.

GEORGIA, *Fulton Co.:*

Before me came Israel Putnam, who, on oath, being sworn, says: That the Vicksburg and Meridian Railroad Company is a foreign corporation doing business and residing out of said State, and that it has damaged him in the sum of twenty-five thousand dol-
2 lars by reason of an injury which it did to him in the State of Mississippi; deponant swears that the said Vicksburg and Meridian Railroad Company is indebted to him in the sum of twenty-five thousand dollars by reason of said injury.

ISRAEL PUTNAM.

Sworn to and subscribed before me, this 24th day of Jan'y, 1882.
DANIEL PITCHFORD, *J. P.*

Bond.

GEORGIA, *Fulton Co.:*

We, Israel Putnam, principal, and I. S. Boyd, Livingston Mims, and H. S. Stockdell, securities, acknowledge ourselves bound unto the Vicksburg and Meridian Railroad Company in the sum of fifty thousand dollars, subject to the following conditions:

That the said Israel Putnam, principal, is seeking an attachment against the said Vicksburg and Meridian Railroad Company, which is now about to be sued out, returnable to the December term of the city court of Atlanta, of the county aforesaid:

Now if the said Israel Putnam shall pay all damages that the said Vicksburg and Meridian Railroad Company may sustain, and also all cost that may be incurred by it in consequence of suing

3 out such attachment in the event that the said Israel Putnam shall fail to recover in said case, then this bond to be void.

ISRAEL PUTNAM. [L. S.]
L. MIMS. [L. S.]
ISAAC S. BOYD. [L. S.]
H. C. STOCKDELL. [L. S.]

Executed in the presence of Daniel Pitchford, J. P., this 24th day of Jan'y, 1882.

Attachment.

GEORGIA, *Fulton Co.*:

To all and singular the sheriffs and constables of said State:

You are hereby commanded to attach and seize so much of the property of the Vicksburg and Meridian Railroad Company as will make the sum of twenty-five thousand dollars and all costs; and also serve such summons of garnishment as may be placed in your hands, and that you make return of this attachment with your actings and doings entered thereon to the June term, 1882, of the city court, of Atlanta, of the said county, to which court this attachment is hereby made returnable.

Herein fail not.

Witness my hand and seal this the 24th day of Jan'y, 1882.

DANIEL PITCHFORD, *J. P.* [L. S.]

4 *Service by Sheriff.*

I have this day levied the within attachment by serving a summons of garnishment in said case upon the Western and Atlantic Railroad Company by serving said summons upon R. A. Anderson, superintendent of said company, and by leaving said summons at the place of transacting the usual and ordinary public business of said corporation, at ten o'clock a. m., March 28th, 1882.

A. M. PERKENSON, *Sh'ff.*

I have this day levied the within attachment by serving a summons of garnishment in said case upon the Atlanta and West Point Railroad Company by serving said summons upon L. P. Grant, superintendant of said company, and by leaving said summons at the place of transacting the usual and ordinary public business of said corporation, at ten and one-half o'clock a. m., March 28th, 1882.

A. M. PERKERSON, *Sh'ff.*

Filing.

Filed in office May 16th, 1882. C. H. STRONG, *Clerk.*

Answer of Garnishee.

City Court of Atlanta. June Term, 1882.

ISRAEL PUTNAM

vs.

VICKSBURG AND MERIDIAN RAILROAD COMPANY.

And now at the June term, 1882, of the city court of Atlanta,

5 to wit, on this 27th day of June, 1882, comes the Western and Atlantic Railroad Company and makes answer to the garnishment served upon it by service upon its superintendant, R. A. Anderson, on March 28th, 1882. Respondent, reserving all questions as to said service, saith: That said Western and Atlantic Railroad Company is not indebted to the defendant in any sum whatever, and was not indebted to it at the time of said service, and has not been indebted to it at any time since said service and this answer. Respondent further says that said company is not now, and was not at the time of said service, and has not been at any time since said service and the time of this answer, possessed of any property or effects of the defendant whatever. Respondent further says that it has incurred ten dollars as expense as attorneys' fees in making this answer, which sum respondent asks to be allowed it as costs, as provided by the law. And having now fully answered by its said superintendant, on whom said service was made, respondent asks hence to be dismissed. This June 27th, 1882.

JULIUS L. BROWN,
Att'y W. and A. R. R. Co.

STATE OF GEORGIA, *Fulton County:*

6 You, Robert A. Anderson, superintendent of the Western and Atlantic Railroad Company, do swear that the facts stated in the above and foregoing answer are true to the best of your knowledge and belief. So help you God.

R. A. ANDERSON, *Superintendent.*

Sworn to and subscribed before me, this June 27, 1882.
C. T. WATSON, *N. P.*

Filed in office June 27, 1882. C. H. STRONG, *C. S. C.*

Declaration in Attachment.

GEORGIA, *Fulton Co.:*

To the city court of said county:

The petition of Israel Putnam shows that the Vicksburg and Meridian Railroad Company, a corporation organized and located in Mississippi, has damaged him in the sum of twenty-five thousand dollars by reason of the following facts: On the night of the 15th of September, 1881, your petitioner was a passenger on a car of said railroad company, the same being a common carrier. About daybreak on the morning of the 16th, near Edwards, in the State of Mississippi, while your petitioner was riding as a passenger, carried by said V. and M. Railroad Company, the car in which he was riding jumped from the track or fell, the rail breaking. The accident was caused by the negligence of defendant, and resulted from the defective condition of the road-bed, from rotten cross-ties, from the worn condition of the rail, from the imperfect condition
7 of the running-gear, and from other negligence on the part of defendant. The defendant was also at fault in the manner of running the train, the speed being too rapid. The plaintiff,

your petitioner, was without fault, and the accident resulted from defendant's negligence. By reason of said accident your petitioner received serious bodily injuries, causing to him great mental and physical pain. Your petitioner's collar bone was broken, a point of his shoulder bone was broken, his shoulder blade was broken, several of his ribs in the back and in the front were fractured, his ear was cut open, he was bruised from his head to his feet, his hearing and his sight were impaired; for several weeks after the accident his spit blood; he was confined to his room for months, unable to do anything except to attend to his injuries; his breathing was made difficult, his capacity to work and endure fatigue was impaired and lessoned one-half; his injuries were of a permanent character in all respects, including pain and suffering. Your petitioner was at the time 48 years of age, and was making five thousand dollars per year from his personal exertions. Your petitioner has incurred an expense of two hundred dollars for the services of physicians to attend to his wounds, and the further sum of one thousand
8 dollars for other expenses connected with said injuries, such as medicines, servants, and nurses' bills, etc., etc. Your petitioner has commenced his action by an attachment, returnable to the June term, 1882, of the city of Atlanta, for the recovery of the damages hereinbefore stated. Said attachment has been levied by service of process of garnishment upon the Atlanta and West Point R. R. Co. and the W. and A. R. R. Co. Your petitioner makes this his declaration of the facts in said attachment case, and asks for judgment against the V. and M. R. R. Co. for the amount hereinbefore stated.

HAKE SMITH,
Att'y for Petitioner.

Filed in office June 28th, 1882.

C. H. STRONG, *C. S. C.*

Plea of Defendant. Suit for Damages for Personal Injury.

In City Court of Atlanta.

ISRAEL PUTNAM *vs.* VICKSBURG AND MERIDIAN R. R. CO.

And now comes the said defendant, by its attorneys-at-law, Mynatt and Howell, and defends the wrong and injury, when, &c., and for plea says it is not guilty of the supposed wrongs and injuries complained of by the plaintiff in his declaration, and of this it puts itself upon the country.

MYNATT & HOWELL,
Att'ys for Def'd't.

9 Filed in office July 12th, 1882.

C. H. STRONG, *Clerk.*

Petition for Removal.

In the City Court of Atlanta, State of Georgia.

ISRAEL PUTNAM
vs.
THE VICKSBURG AND MERIDIAN RAILROAD COMPANY.

Petition for removal to the circuit court of the United States for northern district of Georgia.

To the said city court of Atlanta:

Your petitioner, the said Vicksburg and Meridian Railroad Company, shows that the matter and amount in dispute in the above-entitled suit exceeds, exclusive of costs, the sum or value of five hundred dollars. That the controversy in said suit is between citizens of different States, and that your petitioner was at the time of the commencement of said suit and still is a citizen of the State of Mississippi, in which State petitioner was incorporated and then did and now does business, and that the said Israel Putnam was then and still is a citizen of the State of Georgia, in the said northern district thereof.

And your petitioner offers herewith a bond, with good and sufficient surety, for its entering in said circuit court of the United States, on the first day of its next session, a copy of the record in this suit, and for paying all costs that may be awarded by said circuit court, if said court shall hold that this suit was wrongfully or improperly removed thereto.

And petitioner prays this honorable court to proceed no further herein, except to make the order of removal required by law, and to accept the said surety and bond, and to cause the record herein to be removed into said circuit court of the United States in and for the said northern district of Georgia.

And petitioner will ever pray.

MYNATT AND HOWELL,
Att'ys for Petitioner.

GEORGIA, *Fulton Co.:*

Before the undersigned personally appeared G. A. Howell, who, on oath, says: That he is one of the attorneys for petitioner in the above-stated case, and that the statements in said petition are true, to the best of his knowledge and belief.

G. A. HOWELL.

Sworn to and subscribed before me, this Feb'y 2d, 1883.

J. H. JONES,
Notary Public, Fulton Co., Ga.

Bond for Removal.

GEORGIA, *Fulton County:*

Know all men by these presents, that the Vicksburg and Meridian Railroad Company, as principal, and "———," as surety, are held

and firmly bound unto Israel Putnam in the sum of two hundred and fifty dollars, for the payment of which we bind ourselves,
11 our successors, heirs, and legal representatives and assigns, jointly and severally, firmly by these presents.

Yet upon these conditions: The said railroad company having petitioned the city court of Atlanta, Georgia, for the removal of a certain cause therein pending, wherein said Putnam is plaintiff and said Railroad Company is defendant, to the circuit court of the United States for the northern district of Georgia: Now, if the said railroad company shall enter in the said circuit court of the United States, on the first day of its next session, a copy of the record in said suit, and shall well and truly pay all costs that may be awarded by said circuit court if said court shall hold that said suit was wrongfully or improperly — thereto, then this obligation to be void; otherwise, of full force and virtue.

Witness our hands and seals, this second day of February, 1883.

VICKSBURG & MERIDIAN RAILROAD COMPANY, [SEAL.]
Per MYNATT & HOWELL, *Its Att'y-at-Law.*
CAMPBELL WALLACE. [SEAL.]

In presence of—
J. H. JONES,
Notary Public, Fulton Co., Ga.

Filed in office February 2nd, 1883.
C. H. STRONG, *C. S. C.*

12 *Amendment to Declaration.*

Pl'ff amends his declaration, and says that the accident which resulted in his injuries was produced by the gross negligence of def'd't, the facts being as follows: The iron used as rails was so old that it — thoroughly unsafe; the cross-ties and road-bed had been neglected, and the entire condition of the road in these respects had been frequently called to the attention of the board of directors by the superintendent, and had been by him declared to be unsafe. Pl'ff charges these facts as aggravating circumstances, and sues for punitive damages.

HAKE SMITH,
Pl'ff's Att'y.

Notice of the filing of this amendment acknowledged.
Feb'y 26th, 1883.
MYNATT AND HOWELL,
Att'ys for Def'd't.

Filed in office February 26th, 1883.
C. H. STRONG, *C. S. C.*

Order of Removal.

Upon considering this application it is ordered that the said bond be accepted and that the application be granted, and the cause

be removed from this court to the circuit court of the United
13 States for the northern district of Georgia, and that the clerk of this court make out and send to said circuit court a complete record of all the papers, pleadings, &c., &c., in this court appertaining to said case.

This Feb'y 26, 1883. December term, 1882.

RICHARD H. CLARK,
Judge C. C. A.

STATE OF GEORGIA,
County of Fulton, } *ss:*

I, C. H. Strong, clerk of the superior court and *ex-officio* clerk of the city court of Atlanta in and for said county, do hereby certify that the foregoing is a true and complete transcript of the proceedings had in the city court of Atlanta in the case of Israel Putnam *vs.* The Vicksburg and Meridian Railroad Company, as appears of record and of file in my office.

Given under my hand and seal of office, this 9th day of March, A. D. 1883.

[SEAL.]

C. H. STRONG,
C. S. C. & ex-officio Clerk C. C. A.

Filing.

Filed in clerk's office March 13, 1883.

R. E. BOYD,
Deputy Clerk U. S. Cir. Court, N. D. of Ga.

Amendment to Declaration.

14 Plaintiff amends his declaration and says that the amount of his physician's bill is $300, and for that amount he prays for a judgement.

HOKE SMITH,
Pl'ff's Att'y.

Filing.

Filed in office April 28th, 1883. R. E. BOYD,
Deputy Clerk.

Charge of the Court.

Damages. In the United States Circuit Court, H. K. McCay, Judge, Presiding. Trial April 28th, 1883.

ISRAEL PUTNAM
vs.
VICKSBURG AND MERIDIAN R. R. Co.

GENTLEMEN: This is an action brought originally from the State court of Fulton county, of this State, but the defendant, being a citzen of Mississippi, has exercised the right which he has in the Constitution and laws of the United States to transfer and remove the case from the State court to the U. S. court for trial, and it is now before us for hearing.

The plaintiff claims he was a passenger on defendant's railroad in Mississippi on the 16th of September, 1881, and during the night, about daybreak, that there was a run-off of the train, the cars were thrown over, and he was seriously injured; that he became unconscious, and for several days did not know anything; that he had a raging pain; that his ribs were broken, his collar-bone broken, his ear cut, and his eye injured; that he continued for some time confined to his bed, and that he continued almost entirely unfit to do any work or business until January thereafter—at least he claims that he was damaged in that way.

Now I charge you that a common carrier (which this railroad was) is bound under the law for damages which its passengers suffer, for injuries received by reason of any want of that extraordinary care and diligence which the law casts upon a carrier.

The law of Georgia, which is the law of England, and is the law of all the States, unless there is some statute to the contrary, makes a distinction between a common carrier of passengers and a common carrier of goods. A common carrier of goods is bound to carry them any way; he is bound for hidden defects to machinery and for robbers and for everything to carry the goods, because he has the goods in his charge, and has the whole control over them, but a carrier of passengers is not so tightly bound as that. The passenger is there and can exercise control himself. Therefore the law lays down this rule in regard to a carrier of passengers, that he is bound to extraordinary diligence; that is, that diligence which a very prudent man takes. That is the language of the code of Georgia, and is the common law. Extraordinary diligence is that diligence which very prudent persons, having charge of a thing of that kind, would take of it.

I charge you that if the testimony shows to you that this man was hurt, and shows you that he was hurt for the want of the exercise by the defendant of that extraordinary diligence that the law casts upon a railroad company, then the railroad company is bound to pay whatever damages he sustained; but if the company did exercise that extraordinary diligence which very prudent men exercise, or ought to exercise under such circumstances, if it did exercise such diligence in your judgment, why, then, the railroad company is not liable, if it could not be helped, although defendant be sadly injured, yet the company is not liable.

One side has set up a poor mouth, that in consequence of poverty it could not keep the road in order, because it was too poor.

I charge you if a road carries passengers it is bound to have good cars, stages, tracks, etc., and if it be too poor to keep it in order it has got no business to run. But, on the other hand, you are not to plunder this company because it is in the hands of a rich organization. The courts are established for the purpose of doing justice, not excusing the poor nor punishing the rich, but doing equal justice to all men, rich and poor. There is one distinction I will call your attention to after awhile where there is a difference in regard to this matter. I will come to that after awhile.

Now, it is insisted, by the defendant, that this accident was caused

by some defect which was unfor-seen. That is not enough. They might shut their eyes and not try to see it, or they might have poor eyes. It must be unfor-seeable by extra care, not only unfor-seen, because there might be poor agents. They must have good eyes to look; they have good agents to hunt up the dangers and defects; they must perform everything, as very prudent men would perform, under circumstances like those in question.

Upon the testimony I charge you as follows: The principal witness for the defendant was a man who was the section-master, that is Mr. Smith. If there was a rotten tie there, and he had overlooked it, he would be strongly tempted to conceal it and put the fault on somebody else. The superintendent was the agent of the
18 road, but he testifies he did not examine it.

He saw the accident was caused by a broken rail. He was in a hurry to get off, and he did not examine it closely.

His testimony, therefore, does not amount to much, except to establish the fact that it was caused by a broken rail. What broke the rail he does not know. He does not know whether it was caused by a bad cross-tie, or by the iron being so thin that it could not support the weight, or whether it was caused by the constant, everlasting action of electricity, magnetism, and vibration, as was the opinion of Smith, the section master (he calls it chrystilization), so as to disintegrate the parts to make it brittle. The older a rail gets, as the section master says, the more liable it is to break, because it gets thinner by wear, and it gets brittle as these actions upon it are continued for a long time.

Now, the testimony of two of the plaintiff's witnesses are persons who examined this tie and these pieces of iron right at the time, perhaps before even Mr. Smith did—at any rate right at the time. One of them seems to be a man who knows something about railroads. Mr. Roach says the rail was badly rusted and had the appearance of having lain upon a rotten or wet cross-tie. And
19 then there is the testimony of Mr. Carrington, who says the proximate cause was a rotten cross-tie. If it was a bad cross-tie and it was the cause of the accident, why, then, the negligence of the road would be very great or the negligence of the employees, because that was a thing anybody could see. Three of the witnesses says that it was a bad cross-tie. You remember, with regard to these things, it is only a matter of opinion of these men.

One says that it was a rusty place, as though it had lain on a rotten cross-tie. Another says right at the place where it was broken there was a rotten cross-tie. Another stated the primary cause was a rotten cross-tie. These are opinions.

Mr. Smith stated that he went and worked on it and studied it, and he came to the conclusion that the rotten cross-tie had nothing to do with it, and he arrived at that conclusion from examining the different breaks, and deduced what was probably the result from them, he saying none of the breaks was under the decayed cross-tie. He is contradicted by one of the witnesses, who says that right under the place which was broken was a rotten cross-tie.

If the rotten cross-tie was the primary cause, why there was a

plain, open case of negligence. It would be their duty to look after it, and if that caused the broken rail and this man is damaged the company would be liable.

20 But it is insisted by the company that the broken rail came from some secret defect. If you believe that to be true, and that secret defect could not have been ascertained by proper diligence, for every means must be used to detect it, especially in case of iron that is very old—if every means had been used to detect it, then the road is not liable.

If you put an old man to do a young man's work you ought to be sure that the old man is sound; you ought to test him. And so if you put an old rail forty years old, that has been run over by train after train for forty years, and put that to do the work of a piece of iron. I believe there is no testimony about the average age, but it is a question of universal notoriety that, as Mr. Smith said in his testimony, old rails are much more apt to break than new. If this rail had been here a long time it was their duty to take extraordinary care. Now, what would that be? Not merely to look at it; you can do that with the very best kind of rails. They would have a man pass over there, as he says, two or three times a week and look over everything. He does that with the very best kind of rails. When these rails get old and are liable to break much closer care

21 ought to be taken. I would not be prepared to say what they ought to do in a case like this. If a rail be forty years old perhaps they ought to send a man around every day to hammer it. I do not say that this would be their duty. I suggest that to you for your consideration, because this is extraordinary to use a forty years' old rail.

There is no evidence that they did anything more with that than they did with any other rail. In this State the jury are judges of what the duty would be. I do not know what is the law of Mississippi, but as it is to be tried by Georgia law the jury are the judges. If there was just slight negligence then they are liable, because slight negligence is the opposite of extraordinary diligence. If the negligence is slight they are liable; you are to judge by what you know of human affairs, by what has been proven before you of the nature of this kind of business. This diligence become- more important in the case of a railroad, where when an accident happens it is terrible. A stage coach may break down and very little harm happen; but when a train goes rushing and roaring along and it breaks down human life is sacrificed. Hence a higher degree of diligence is necessary.

Well, now, if, under these rules, you find that the defend-

22 ant was not negligent, it is not liable, and you will find for the defendant altogether; but if, under these rules, you find that it was even slightly negligent, then it is liable.

The next question you should look at is that of the amount of damages; and the law is a little different in the case of damages between men. Some men who have received hurts and have had injuries done them are entitled to more damages than others, because they are better men. Some men are better money maker- than

others; some have trades, some no trades; and some are better able to use what God has given them or what they have acquired by education, and when anybody prevents them from exercising those powers they ought to be paid for in proportion to what those powers are. The rule I shall give you is only proximate, for a man who is only a common laborer may become a statesman and be worth millions of dollars, capable of making hundreds of thousands of dollars every year. So the man who is making money rapidly now may get to be a perfectly worthless man, and hence these things are uncertain, and you must only get at an average. You cannot get at absolute truth. A man who is making a small income and is deprived of that income is entitled to but small damages. A
23 man who is making a large income and is deprived of it is entitled to large damages.

As to damages:

First. There is the actual pecuniary damage. Mr. Smith had a better word for it; he called it financial compensation; that is, the damage which can be computed with certainty—as, for instance, a doctor's bill; that can be computed with certainty, and that has been proven in this case to be $290. Also the loss of time can be computed. It did not appear whether this man lost anything or not by the loss of time—whether he lost his salary. The company would not be bound to pay him perhaps for his salary if he did not perform his duty. There might be actual damage for the loss of time if there has been any sustained, but you cannot imagine expenses unless they are proven.

In this case, so far as the salary is concerned, the presumption would be that he had lost his salary. That might be computed; but there is no evidence about it. What the truth is about that we do not know, but, he having lost his time, the presumption is he lost his pay, and that would be another element of damage which you could ascertain with certainty.

Second. Then there is another kind of damage for which
24 there may be compensation, and that is for the pain and suffering. In all these cases of serious injury money cannot pay for the pain and suffering.

It only approaches to it; but he is entitled to some compensation for the pain and suffering. Now, that is left to the enlightened consciences of the jury. There is no measure for this, except that you are not to treat the thing lightly, and say I won't give much damage for that; it is a small amount. Nor are you to say that is a railroad company, and I will bear down heavy on it; but try to do justice between the parties.

On this question of pain and suffering it is in your discretion.

There is another element of damage, as claimed in this case, which is less certain, to wit, a kind of speculative damage, in which it is ascertained what a man would make at the time of the accident and what he was capable of making afterward. To find out what he was capable of making you must find out what he did make, and then how much his capacity to do his former duties was injured, and, having ascertained that, find out how old he is; then find out how

much he is damaged every year, and then find out from the table which you will have out before you how much one dollar of
25 annuity to the end of his expect is worth and multiply them together.

As I said, all this is not very certain. You cannot ascertain it to a certainty for several reasons. No man can tell how long a man is going to live, but you can come close to it; you can tell about how many out of ten thousand is going to die per year.

Sometimes an injury is a benefit to a man. I had a conversation with the superintendent of the blind asylum, and he told me of a man in Lowndes county who met with an accident and was made blind by it. He was a rather worthless chap, but they sent him to the asylum and he learned to make useful things, and he went back to Lowndes county and he has got quite well off. You must only average it. A man who makes a good deal of money one day may get to be a drunkard, or his whole business may break down, as is often the case. His mode of life may change. He may be engaged in making hoops, for instance, and in two or three years hoops may go out of fashion and all the concerns go out with them.

Find out what that man is capable of making. His testimony is he had a salary of three thousand dollars, and he had a trade,
26 to wit, an adjuster. Find out his true loss. That was his profession. He said he made seven hundred to one thousand dollars as an adjuster. He was entitled to five per cent. on the profits, and the profits in three years had been about fifteen hundred dollars, but he said afterwards those things were lost at the end of three years. The contract was only for three years; then at the end of that three years he would be entitled to a settlement. As I understood him to say the contract was for three years, and when the three years was up they ought to have a settlement.

Now, you take this three thousand dollars and what he could have made otherwise, what he has shown he did make otherwise, and find out what he did make in one year. Find out from the proof how much he has lost. There is his own testimony, and it is to be taken like the testimony of every other party at interest; his own testimony is he could not carry on his old business. It required an amount of exercise and travel, which would be perfectly impossible for him to take, and he had to go back into a business by the month, where he could have an office and where he would be at — expense.

Under his contract there would be no expense; they paid his expenses. As an adjuster he had his expenses paid, and
27 ten dollars a day. Now, in the new business he still keeps up a small business of adjuster. He gets $175 a month. He has a new business of his own in town, at which he hopes to make one thousand dollars, but thus far there has been no profits. There were expenses connected with it, and the profits were but little as he says.

I say to you that the kind of damage we are now discussing cannot be sure, certain.

He may be damaged more or less now, next year he may be better. This is only one mode of arriving at it. You must take the whole

thing together. He may get well. The doctors tell you the chances are that things of this sort are permanent; that every breath he draws keeps the ribs in motion, and when once injured it is hard to heal. Thus it is with the attachment of the ribs. He may get well or he may not. These things are backward. Try to do what is right and just between the parties. You cannot be accurate, as this kind of damage you can only app-oximate.

Now, gentlemen, if under all these rules you find the defendant is liable, then find the amount of his liability. In arriving at the amount of liability, as I said before, there are two things you
28 must find; first, how much is the actual pecuniary damage he has sustained, the loss of the time and doctor's bill; second, his pain and suffering for the future; and third, you will find out what he has been injured by the year. The company is bound to give him an annuity of the amount he has been damaged by the year, for a period equal to the expectation of plaintiff's life. It would not do to say, this his expectation is thirty years, and he has lost one thousand dollars a year, therefore we will give him thirty thousand dollars, for the annuity will be payable one part this year and another part next year, and each of the thirty parts payable each of the thirty years. You must have a sum such that when he dies it will all be used up at the end of thirty years.

(Mr. Smith, mark the table that has got the calculation.

By Mr. SMITH: I have marked it opposite 49. It is on page 329.)

By the COURT: Add that to the present worth of annuity if you find he was damaged. Find, gentlemen, a verdict, first, for the pecuniary damage; next, the pain, if he has suffered any; next, the loss per year, multiply by the amount you find in that table, and add the three together, and your verdict would be just a general verdict for the amount found.

29 Now, gentlemen, retire and make up your verdict and try and do justice between these parties. The money of the company does not belong to you. This man's health and life does not belong to you. You are only to stand between them and do justice as you would have justice done to you before your God. Retire, gentlemen, and make up your verdict.

Judge's Certificate to Stenographer's Report.

The foregoing is a correct representation of the charge of the court in the above-stated case. May 4th, 1883.

H. K. McCAY,
U. S. Judge.

Filing.

Filed in clerk's office May 4th, 1883.

R. E. BOYD,
Deputy Clerk.

Verdict of Jury.

We, the jury, find for the plaintiff in the sum of sixteen thousand dollars. This 28th day of May, 1883.

O. F. MILLER, *Foreman.*

Filing.

Filed in clerk's office April 28th, 1883.

R. E. BOYD,
Deputy Clerk.

30 *Judgement.*

Whereupon judgement is rendered in favor of the plaintiff against defendant for the sum of sixteen thousand dollars principal, and ninety-two dollars cost, this April 28th, 1883.

HOKE SMITH,
Pl'ff's Att'y.

Filing.

Filed in clerk's office, April 28th, 1883.

R. E. BOYD,
Deputy Clerk.

Answer to Garnishment by A. W. Pt. R. R. Co.

In the City Court of Atlanta and removed to the United States Circuit Court for the Northern District of Georgia.

ISRAEL PUTNAM
vs.
THE VICKSBURG AND MERIDIAN RAILROAD COMPANY.

And now, on this 3d day of May, 1883, comes the Atlanta and West Point Railroad Company, and makes answer to the garnishment served upon it by service upon its superintendent, L. P. Grant, on March 28, 1882. On said day L. P. Grant was not superintendent, but president of said company.

Respondant, reserving all questions as to said service, saith: That said Atlanta and West Point Railroad Company is not
31 indebted to the defendant in any sum whatever, and was not indebted to it at the time of said service, and has not been indebted to it at any time since said service and this answer.

Respondent further says that the said company is not now, and was not at the time of said service, and has not been at any time since said service and the time of this answer, possessed of any property, money, or effects, except the sum of five hundred and forty dollars and sixty-five cents, of the defendant whatever.

Respondent further says that it has incurred ten dollars as expense as attorneys' fees in making this answer, which sum respondant asks be allowed it as costs, as provided by law. And having now fully answered by its said superintendant, on whom said service was made, respondent asks hence to be dismissed.

This May 3d, 1883.

BIGBY, DORSEY & PARROTT,
Att'ys A. W. Pt. R. R. Co.

STATE OF GEORGIA, *Fulton County:*

You, L. P. Grant, president of the Atlanta and West Point Railroad Company, do swear that the facts stated in the above and foregoing answer are true, to the best of your knowledge and belief: So help you God.

L. P. GRANT,
Pres't A. & W. Pt. R. R. Co.

Sworn to and subscribed before me, this May 3d, 1883.
[L. S.] WM. W. GRANT,
N. P., Fulton Co.

32 *Filing.*

Filed in clerk's office May 3, 1883.

R. E. BOYD,
Deputy Clerk.

Motion for New Trial. Action for Personal Injury.

In the Circuit Court of the U. S., Northern Dist. of Ga.

ISRAEL PUTNAM *vs.* VICKSBURG AND MERIDIAN R. R. CO.

In this case the defendant moves the court for a rule upon the defendant to show cause why a new trial should not be granted upon the following grounds, to wit:

1st. Because the court erred in admitting in evidence the printed reports of the superintendant of the road, Mr. Raworth, over the objections of the defendant.

2nd. Because the court erred in admitting in evidence over the objections of defendant the evidence of the witness Atwater as to the condition of the road elsewhere than at the place of the accident.

3rd. Because the court erred in stating to the jury in his charge that the witness, R. H. Smith, was interested to conceal the facts.

4th. Because the verdict of the jury was excessive.

5th. Because the verdict of the jury was contrary to the weight of the evidence.

33 6th. Because the court erred in allowing in evidence over the objections of the defendant the life tables and annuity tables from Reese's Manuel.

7th. Because the court erred in recitals of the evidence to the jury, in stating incorrectly the facts testified to by the witnesses in the following instances:

1st. As to the evidence of the superintendant, Raworth.

2nd. In stating that the section master said the older a rail was the more liable it is to break, because it gets thinner by wear and brittle, as these actions upon it are continued for long time.

3rd. The court erred in instructing the jury upon the relative weight of the testimony in the following language:

"Now the testimony of two of the plaintiff's witnesses, and persons who examined the tie and these pieces of iron right at the

time, perhaps before even Mr. Smith did, at any rate right at the time—one of these seems to be a man who knows something about railroads."

And again, in the following charge:

"If the cause of the accident was a bad cross-tie the negligence of the road or of the employees would be very great, because that was a thing anybody could see. Three of the witnesses say it was a bad cross-tie."

MYNATT AND HOWELL,
Att'ys for Movant.

34 *Filing.*

Filed in clerk's office May 4th, 1883. R. E. BOYD,
Deputy Clerk.

Acknowledgement of Service.

I acknowledge due and legal service of the within motion for new trial, and waive copy thereof, and agree that the evidence in the bill of exceptions may be used on the hearing of this motion, without being copied with this motion.

This 4th May, 1883. HOKE SMITH,
Pl'ff's Att'y.

Filed in office this May 4th, '83. A. E. BUCK, *Clerk.*

Order Overruling Motion for New Trial.

On the hearing of the motion for a new trial the same is overruled.

May 4th, 1883. H. K. McCAY,
U. S. Judge.

Filing.

Filed in clerk's office May 4th, 1883. R. E. BOYD,
Deputy Clerk.

Bill of Exceptions.

Bill of exceptions in the case of Israel Putnam *vs.* The Vicksburg and Meridian Railroad Company, in the circuit court of the United States for the northern district of Georgia.

35 Be it remembered that the above-stated case came on to be tried before His Honor H. K. McCay, judge of the district court of the United States for the northern district of Georgia, and a jury empanneled to try said case on the 28th day of April, in the year 1883.

The plaintiff introduced the following evidence:

Testimony of Israel Putnam (Pl'ff).

ISRAEL PUTNAM, the plaintiff, testifies as follows:

I am the plaintiff. On Sept. 15, 1881, I was in Meridian, Miss.,

till about 10 o'clock p. m., when I left to go over defendant's road as a passenger to Vicksburg, Miss., where I arrived at about 11 a. m. the next day. There was an accident on the road and the cars ran off about day-break of the 16th September, 1881. I was asleep; we were delayed some time. My recollection about the accident is vague, as I was uncons-ious; when I became conscious I was lying on a mattrass near the track; I was taken on a stretcher in the baggage car, and on to Vicksburg, where I remained 16 days. I suffered great pain during the time. Was attended by two phys-cians and several nurses. My breathing troubled me most then on the left side. My left ear had been cut or torn through & sewed up; collar-bone was broken, several ribs were broken, and part of end of shoulder-blade. This was caused by said accident. I came to Atlanta in a sleeper in Oct.; was pretty badly used up when
36 I got here; was suffering and fatigued. Dr. Westmoreland, of Atlanta, attended me almost daily for about four months after I arrived; at intervals I saw him up to last summer. Was in bed and helpless 2 or 3 months after I reached Atlanta. My limbs were not hurt except I was bruised some; Drs. Hunt and Iglebout, phys-cians, sent to me by the defendants, treated and bandaged my wounds at Vicksburg. They put the bandage over my left arm and around it and my body, but when I left Vicksburg they cut the arm loose. Dr. Westmoreland bandaged my body under the arms for 5 or 6 weeks. This helped me much and gave great relief. The broken ribs caused the bad breathing; something hurt me in my chest and down the back under shoulder-blade on left. When the bandage was taken off my body was a mass of sores; sores were disagreeable and painful, and had bad smell for a few days. They soon healed up. Another bandage was put on. I was in a helpless condition till about the middle of January, 1882, when I went to work in South Carolina. I managed to get through with work there, but could not do it well. Before my injury had not been sick two days since 1860, except from typhoid fever once & from piles. Have not been so well since. Can't do as much work; am
37 not so strong. Because of the injuries I can't do continuous work as before. I suffer pain now sometimes. In bad weather am almost laid up. Was in bed all day last Sunday, as the weather was very bad. Was born July 15th, 1832, and will be 51 years old in July. Was 49 years old when injured. Prior to 1881 I was general manager of the Columbus Fire Insurance Co. of Miss. I managed the field work and had to travel all over the territory in which the Co. did business. I adjusted losses, inspected agencies, got rid of bad risks, etc. Traveled all the time, except it was understood I could have a month's holiday in the summer. Close attention and capacity for endurance were necessary in that business. I traveled mostly at night, generally got a sleeper, and would work all day. Did that for three years. In case of fire it was desirable that the adjuster reach there at once to ascertain cause, adjust loss, etc. I can't do as much work by a good deal now as before. I tried, but found I had to take it easy. Was unable to do my work, because of hurt, and had to get others to help

me. I can't do the same work now, and on that account I changed my contract with the company so I could stay at home. For outside work I can't do more than half what I did before. A general manager and adjuster makes from 2 to 3 times as much as a
38 local agent. My salary as general manager was $3,000 per annum. From adjusting for other companies I made from $700 to $1,000 per year. I was also to get 5 per cent. on the net profits of the business, which amounted to some $500 per year. Am getting now a salary of $175 per month, or $2,100 per year. When I adjust I make from that in addition. I now manage the business in Georgia, and several agencies in South Carolina. Before I managed it in 5 or 6 States, Am in a local business here besides, for which I paid fourteen hundred dollars, and which will pay from $1,000 to $1,200 per year. The company paid my expenses before while I traveled. Now I pay office rent, clerk hire, etc., out of my earnings, and these expenses amount to about $1,500 per year. My present adjusting business — about half as good now as before; business not so good here as out West. I make from $400 to $500 a year now adjusting. I changed contract with the company, because I could not — the work. Long trips use me up pretty badly.

I did not know at first that I was hurt; found it out when I tried to get up. Dr. Westmoreland's treatment was mechanical and supported my frame. There was something in my ear, and Dr. W. cut it, the ear, once or twice, and it then healed. Dr. Calhoun has been treating my ear. I can't hear quite so
39 well as before. I expect to have him treat my eyes, too. I had to travel before for the company in Ga., Ala., Miss., North and South Carolina, and Louisiana. When adjusting for other companies I made $10 per day, counting the time going and returning. The business was uncertain and had to be sought. I don't seek the business now; local business don't give me the same freedom. On account of the losses to the company I did not receive anything from the 5 per cent. agreement, as there were no net profits. On Sept. 1, 1881, the old contract with the company under which I had been working was renewed for three years. I wrote to the company, proposing to change it, because I could not do the work, and the company gave up its general business on this account. The company has no general manager now; they have dispensed with general manager and contracted their business. When I withdrew as general manager the company withdrew from such a general business. It now has local agents in Ga. & Miss. only. The company made money while I attended to the business, and when I quit it limited the business. My injuries have been improving and I am gradually getting relief; never expect to get entirely well. While I was sick the company lost som- $7,000 in South Caro-
40 lina it would not have lost but for my condition, as I would have cancelled the risk.

This was all the testimony of the witness Putnam.

Testimony of Gen'l Lewis.

Plaintiff next introduced General LEWIS, who testifies that he is agent of the Equitable Life Insurance Company.

Plaintiff's counsel exhibited to witness a table purporting to be the expectancy of life.

He stated that it was the table used by the American Life Insurance Company.

This was all the testimony of the witness Lewis.

Plaintiff then offered said table in evidence.

The defendant's counsel objected to said table, insisting that plaintiff had not shown a case in which such evidence is admissible, the plaintiff not having been killed permanantly or disabled.

The court overruled the objection and admitted the table in evidence; to which action of the court the defendant excepted then and there and assigned the same as error, and prays that said exception be signed and certified.

The plaintiff also, at the same time, offered in evidence a table from Reese's Manuel, entitled a table showing the value of annuities on single lives according to the Carlisle table of mortality; to which defendant objected, on the same ground stated in the above exception; but the court overruled the objection and admitted the same in evidence; to which action of the court the defendant excepted then, and they assign the same as error and pray that said exception be signed.

41

The table which General Lewis testifies was the same used by the American Life Insurance Company, and which was put in evidence by plaintiff as above, is as follows, to wit:

"Expectation" Table Assured Lives, constructed from the foregoing Mortality Table.

Years old.	Expectation. Years.	Years old.	Expectation. Years.	Years old.	Expectation. Years.
10	48.7	40	28.2	70	8.5
11	48.1	41	27.5	71	8.0
12	47.4	42	26.7	72	7.6
13	46.8	43	26.0	73	7.1
14	46.2	44	25.3	74	6.7
15	45.5	45	24.5	75	6.3
16	44.9	46	23.8	76	5.9
17	44.2	47	23.1	77	5.5
18	43.5	48	22.4	78	5.1
19	42.9	49	21.6	79	4.8
20	42.2	50	20.9	80	4.4
21	41.5	51	20.2	81	4.1
22	40.9	52	19.5	82	3.7
23	40.2	53	18.8	83	3.4
24	39.5	54	18.1	84	3.1
25	38.8	55	17.4	85	2.8
26	38.1	56	16.7	86	2.5
27	37.4	57	16.1	87	2.2
28	36.7	58	15.4	88	1.9
29	36.0	59	14.7	89	1.7
30	35.3	60	14.1	90	1.4
31	34.6	61	13.5	91	1.2
32	33.9	62	12.9	92	1.0
33	33.2	63	12.3	93	.8
34	32.5	64	11.7	94	.6
35	31.8	65	11.1	95	.5
36	31.1	66	10.5		
37	30.4	67	10.0		
38	29.6	68	9.5		
39	28.9	69	9.0		

42 Table mentioned above as from Reese's Manuel is as follows:

Age.	6 Per cent.	7 Per cent.	Age.	6 Per cent.	7 Per cent.
0	10.439	9.177	52	10.208	9.329
1	12.078	10.605	53	9.988	9.205
2	12.925	11.342	54	9.761	9.011
3	13.652	11.978	55	9.524	8.807
4	14.042	12.322	56	9.280	8.595
5	14.325	12.574	57	9.027	8.375
6	14.460	12.698	58	8.772	8.135
7	14.518	12.756	59	8.529	7.940
8	14.526	12.770	60	8.304	7.743
9	14.500	12.754	61	8.108	7.572
10	14.448	12.717	62	7.913	7.403
11	14.384	12.669	63	7.714	7.229
12	14.321	12.621	64	7.502	7.042
13	14.257	12.572	65	7.281	6.847
14	14.191	12.522	66	7.049	6.641
15	14.126	12.473	67	6.803	6.421
16	14.067	12.429	68	6.546	6.189
17	14.012	12.389	69	6.277	5.945
18	13.956	12.348	70	5.998	5.690
19	13.879	12.305	71	5.704	5.420
20	13.835	12.259	72	5.421	5.162
21	13.769	12.210	73	5.170	4.927
22	13.697	12.156	74	4.944	4.719
23	13.621	12.098	75	4.760	4.549
24	13.541	12.037	76	4.579	4.382
25	13.456	11.972	77	4.410	4.227
26	13.386	11.904	78	4.238	4.067
27	13.275	11.832	79	4.040	3.883
28	13.181	11.759	80	3.858	3.713
29	13.096	11.693	81	3.556	3.523
30	13.020	11.636	82	3.474	3.352
31	12.924	11.578	83	3.286	3.174
32	12.860	11.516	84	3.102	2.999
33	12.771	11.448	85	2.909	2.815
34	12.675	11.374	86	2.739	2.652
35	12.573	11.295	87	2.599	2.519
36	12.465	11.211	88	2.515	2.439
37	12.354	11.124	89	2.417	2.344
38	12.239	11.033	90	2.266	2.198
39	12.120	10.939	91	2.248	2.180
40	12.002	10.845	92	2.337	2.266
41	11.890	10.757	93	2.440	2.376
42	11.779	10.671	94	2.492	2.419
43	11.668	10.585	95	2.522	2.451
44	11.551	10.494	96	2.486	2.420
45	11.428	10.397	97	2.368	2.309
46	11.296	10.292	98	2.227	2.177
47	11.154	10.178	99	2.004	1.964
48	10.998	10.052	100	1.598	1.569
49	10.823	9.908	101	1.175	1.159
50	10.631	9.749	102	0.744	0.735
51	10.422	9.573	103	0.313	0.312

Testimony of Dr. Willis F. Westmor-land.

Plaintiff next introduced Dr. WILLIS WESTMORELAND, who testified:

That he was a surgeon; that he knew plaintiff; plaintiff was his patient in the fall of 1881; his ear was cut through—had partly healed; an ab-cess in the ear; his collar bone was broken and had lapped, which made it shorter; three or four of his ribs were broken and one or two had been seperated from cartileges. He was also bruised in parts of his body and limbs. One rib was broken in front, where it connects with the breast bone, and two or three
43 in rear under the shoulder-blade; wound in the ear was annoying; he don't hear well—drum thickened; had advised him to see ear doctor. Displacement of the ribs caused pain in the chest and also in his back. It might be that the ribs were irritating the membrane where the broken ends came in contact with it; sometimes broken ribs pierce the lungs. The difficulty of healing applies to the rib broken from the breast-bone. The injuries in such case are apt to be pe-menant; sometimes they grow worse and sometimes they get well; can't say how it will be in the plaintiff's case; could not say they did in plaintiff's case, but they were very painful. The plaintiff visited me often for treatment. I could do very little for him; gave him no physic. All that was necessary was to keep his ribs still so that they might heal. When ribs break they always lap in healing, and make at that point what appears to be a knot; so with the collar-bone—where it is broken seems to be a knot; it is the lapping of the bones; that is the way they always heal. They cannot be held to their place as in a break of the arm or leg. After they heal they frequently produce uneasiness; the protrusion of the knot makes a little friction. It is an unnatural state of things, and may always give a little pain in changes
44 of the weather, and at other times. Sometimes they get entirely well; in other cases they do not. Witness could not tell how it would be in plaintiff's case. Plaintiff attempted to travel on cars too soon, and came back broken down. He is able to travel on train now; may give him some pain at times. One injured as he was is more easy, while so injured, in a standing position or walking; while standing or walking his ribs would not hurt him. My charges were $290 or $300. He has paid me a very small part of it; I do not know how much.

This was all the evidence of this witness.

Testimony of C. R. Carrington.

Plaintiff next introduced C. R. CARRINGTON, who testified:

My regular profession is that of a civil engineer, and I was engaged in prosecuting my profession on the Memphis and New Orleans railroad, when the high waters in the Mississippi river compelled me to quit work. Since then I have engaged as general accountant or secretary of James F. Stokes. I am now engaged as

above temporarily only. I have been practically engaged as a civil engineer in the field for three years, and for six months during that time I was engaged in receiving and inspecting railroad iron
45 or rails, six months for the Richmond and Alleghaney R. R. I received the greater portion of the steel rails for that road. I inspected a few cross-ties for this last-named railroad. For three or four months I inspected cross-ties for the Georgia Pacific railroad during the year 1882. I was present at the time and place mentioned when the plaintiff was injured, and assisted to carry him on a stretcher from the first pass. coach or sleeper to the baggage car. I made a careful examination to see what caused the accident, and found that a cross-tie was decayed very badly, and that this was the primary cause of the accident. I also found that the rail over it had a flaw in it, and it broke into several pieces. This broken rail was very old, and of course very inferior, and liable to give way at any time. I saw him (plaintiff) at the time of the accident, and assisted in carrying him to the baggage car on a stretcher. I never saw the plaintiff until the accident mentioned above occurred, and was then told that his name was Col. Putnam. I assisted to move him as stated above. I have never seen him since, though I know him by character. I did see plaintiff on the occasion mention-. As well as I remember he was injured in the back and around about the thigh. I made no critical examination of his injuries.
46 The only acquaintance I have with the plaintiff is stated in my answer to 2 X Int. He has never spoken to me about this case. He never talked to me about it. I was at that time on my way to take work as civil engineer on the Georgia Pacific railroad. Greenville, Mississippi, was our headquarters. My home is where I may happen to be at work. A civil engineer changes his work so often that you can't say where he lives, unless the place of his work furnishes the criterion of his residence. I am now engaged in the State of Mississippi. I was never in the employment of the defendant.

This was all the evidence of the witness.

Testimony of Atwater.

Plaintiff next introduced Mr. ATWATER, who testified:

That he had travelled over defendant's road 24 or 25 times; knows where Edwards is and also Bolton.

Witness was asked the condition of the road between Bolton and Edwards when he passed over it.

Defendant objected to this question, and as to any evidence as to the condition of the road generally or at any place, except at the place of the accident in question, because the general condition of the road was not involved. The court overruled the objection of the defendant, and held that the witness might state the general
47 condition of the road or its condition between Bolton and Edwards; to which ruling of the court the defendant then and there excepted, and assigned the same as error, and prays that this exception be signed and certified.

Witness answered the question, stating that the condition of the road was bad between Bolton and Edwards. I rode in caboose on freight train and stopped at all stations. The rails were old and worn. Only looked at the track at stations. (This answer and the following were on cross-examination.) Never examined the track where the accident occurred. I do not know what the condition of the rails was at the place of accident. Where I saw the road the rails were old and the cars ran as if on a rough road; the rails were worn from ½ to ¾ of an inch on top at nearly every station where I stopped. I live in Atlanta; have no railroad experience except as a traveler.

This was all the evidence of this witness.

At the conclusion of the evidence of this witness the defendant's counsel moved to rule out all the evidence of the witness about the general condition of the rails, or the condition of the rails or road at any point on the road except at the spot of the accident, which the witness said he had not examined.

The court refused to rule out the evidence, and held that the same was proper evidence. To which action of the court the de-
48 fendant then and there excepted and assigned the same as error, and prays that this exception be signed.

Plaintiff next tendered in evidence what purported to be the printed reports of the superintendant of the road, made, the first in 1871 and the second in 1880. These reports were in printed pamphlets and purported to have been made by the sup't to the directors of def'd't.

The defendant objected to said reports because they were not sworn to under examination, as evidence in court is required to be; because said reports had no reference to the place of the accident, but only to the general condition of the rails of some parts of the road, and because the defendant could not be charged with said reports as admissions, the statement of its agents, not a part of *res gestæ*, being inadmissible; and because the information of the superintendant as to the condition of the road was derived in part from reports of subordinates.

The court overruled the objections, and parts of said reports were admitted in evidence. To which action of the court the defendant then and there excepted and assigned the same as error, and prays that this exception be signed and certified.

The parts of said printed reports were as follows, to wit, for year 1877:

"Sup't's Report to Directors.

"I have annually alluded to the old iron we are running
49 over. In my last report I stated that on that portion of the road where our heaviest traffic was done there were about 35 miles of iron that had been run over for more than thirty-five years. These rails weigh now about 39 pounds to the yard, and are daily made to sustain the weight of 24 to 26 tons engines with their trains, and require the closest attention to prevent accident."

This is all that was read of said report.

For the year 1880 as follows:

"The record of this rail, considering the difficut strains upon it, is wonderful, and shows the good material of which it is composed. There are twenty-five miles of your track made of the iron laid down upon the road originally, and 42 years in service. Its original weight was forty-five pounds to the yard. Now it is almost entirely worn out, and when taken up is fit only for the rolling mill. This old rail should be moved at once, and the track put in condition to make reasonable speed, so that we can take advantage of the improved connections which are offering, and from some of which we derive the increased business which our past year's operations exhibit."

This was all of said report that was read.

Testimony of Grant Wilkins.

50 Plaintiff next introduced GRANT WILKINS, who testified:

That he had had a long acquaintance with the manufacture of iron, and knew of no such thing as chrystilization in iron.

This was all the evidence of this witness.

Testimony of R. H. Smith (Section-Master).

R. H. SMITH:

I reside at Edwards, Hinds county, Mississippi. I am foreman of section number 19 on the Vicksburg and Meridian railroad. I have been foreman on this road fifteen years; at the section where I now am seven years. I knew of the accident which occurred on the 16th of September, 1881, about one and three-quarters of a mile east of Edwards. As soon as I was notified of the accident I went to the place with my force, and after having assisted the wounded passengers on the train I then went to examine the track and the causes that led to the accident. I found a rail broken in three or four pieces. I think the breaking of this rail was the cause of the accident. I then put the pieces in juxtaposition to examine and see how the cross-ties rested under this part of the rail. I found the breaks did not occur on the cross-tie. It is readily seen by examining the bottom of the tie, by its brightness, caused by friction
51 against the tie where the rail rested on the tie. Then, upon further investigation, I said, "Here is order; here is systematic effect;" and the question arose in my mind, "What was that cause?"

I omitted to state above that one piece of this rail, about ten feet long, remained in the track, the end of which I found to be battered, as would result from wheels attempting to mount it. Upon reflection I concluded that the first break must have occurred at the point marked D on the diagram before me, and then the part of the rail next to it forming a lever whose fulcrum was a tie near the point C (indicating on diagram) broke the rail again at the said point,

which, acting in like manner, broke it again at the point B, which, acting in like manner, again broke it at the point A. The displacement in these successive breaks caused the pieces to be disarranged or put out of line, which, when the trucks following reached, they were derailed and took the direction as indicated by the lines A F and H G.

I furthermore concluded that the first break could not have occurred at the point A from the fact that if it had so occurred the derailment would have been so complete at the point that there
52 would have been no pressure upon the part of the rail between A & D, and consequently no breakage on that part of the rail.

I could upon no other theory account for these successive breakages, unless it be that it occurred at the point D first. This part of the broken rail was apparently sound and good, without an apparent flaw in it. The break was clear, bright, and square, as was the break at C & B, but at the point A the bottom part of the rail was torn, a clear break reaching to within about a quarter of an inch of the bottom of the rail, and then turned downward, thus evidencing the fact that it must have been from a weigl.t acting at a point B on the lever A B, causing the rail to rise up at the point B and break at the top first at the point A.

If it had broken at this point by any weight or force applied at the point on the top of the rail at the point A, I think it would have broken at the bottom first, as then the bend would have been downward; whereas it was upward, from the fact of the torn fragments at the bottom at this point and the clear break at the top.

There was one defective cross-tie, and only one, at or near the point A. This cross-tie had defects beginning at its south
53 end and running towards the rail twelve inches; from this point to the rail is nine inches, and that part of it, as well as under the rail and between the two rails and on the north side of the rail, was to all appearances good and sound.

The balance of the ties under the parts of the broken rail were all apparently sound. There was a slight defect on the rail near the point A. At the points B, C, and D, from B to D, there was no defect in this broken rail. The slight defect alluded to a moment ago was a lamination near A; but my experience, running over a period of fifteen years, is that laminated rails break much less frequently than rails not worn, lamination being the evidence of toughness, perfection of fiber, softness, or the absence of the conditions favorable to *chrystilization*. What I mean by *chrystilization* is the disintegration or severing of the cohesive parts of a solid body, whether superinduced by electricity, magnatism, or any other cause that may produce this disintegration of the fiber. The broken rail showed very little wear at the points D, C, and B.

I passed over this part of the road the evening before about sunset; the accident occurred about five o'clock the next morn-
54 ing. I always keep my eye on the track. I passed that part of my track for six weeks previous before the accident twice every day, as I was laying new iron just east of it; and on the even-

ing before the accident, in passing over this point, I saw nothing to indicate that there was danger lurking there, and as the rails seemed to be entirely perfect I could not judge otherwise, unless it had been taken up and broken, as there was no way for me to look inside of the rail without so doing. In passing over the track I always kept my eye resting upon it as I went on, watching, looking for any danger point. I found none hereabouts the evening before. The ties under this rail were all sound, and I thought this part of the track was fully equal to the traffic to which it was daily subjected—one freight train and one passenger train each way each day. The traffic on this road was very light during the summer months and fall until the cotton season opened, when two trains per day had to be run to remove the cotton. In the summer the traffic was very light.

The reason why I made the critical examination detailed above was because it was my duty as foreman of the section to make a report of all accidents and obstructions on the track of the
55 section and the causes thereof.

In the accident which occurred, as above described, the engine, tender, baggage car, and second-class passenger coach passed over the rail safely, but the first-class passenger coach, sleeper, and superintendant's car were derailed and thrown down the embankment, and whose trucks took the course indicated by the curved lines H G and A F. The road at this point is a straight line running east and west. The cars were going in a westerly direction and were thrown on the south side of the track. The rail broke in my opinion under the second-class coach, the rear trucks of which in mounting caused the battered appearance of the end of the rail, which remained in the track, as alluded to previously. Then the following trucks acting upon the points D, C, B, & A successively broke them as described above, and for the reasons set forth. The rails, track, and cross-ties, to all appearances were safe. The derailed car trucks in jumping and passing over the cross-ties by sheer force injured several of them, but I did not discover any original defect in these ties before they were thus disturbed. The ties, not subjected to this unequal and unusual test, might have lasted for several
56 years and passed the trains with perfect safety. I am well satisfied that the primary cause of the break in the rail was not from a defective cross-[tie]. There was nothing in the appearance of the track at this time, either in the cross-ties or in the rail, that arrested my attention, as all was apparently good and sound, and there was nothing at this point to warn me that there was danger, nor could I have ascertained that there was danger. There was no test that I could apply to show any defect without taking up the rail and breaking it. There has not been a derailment on this section caused by a broken rail, except this, since I have been on the section, about six years.

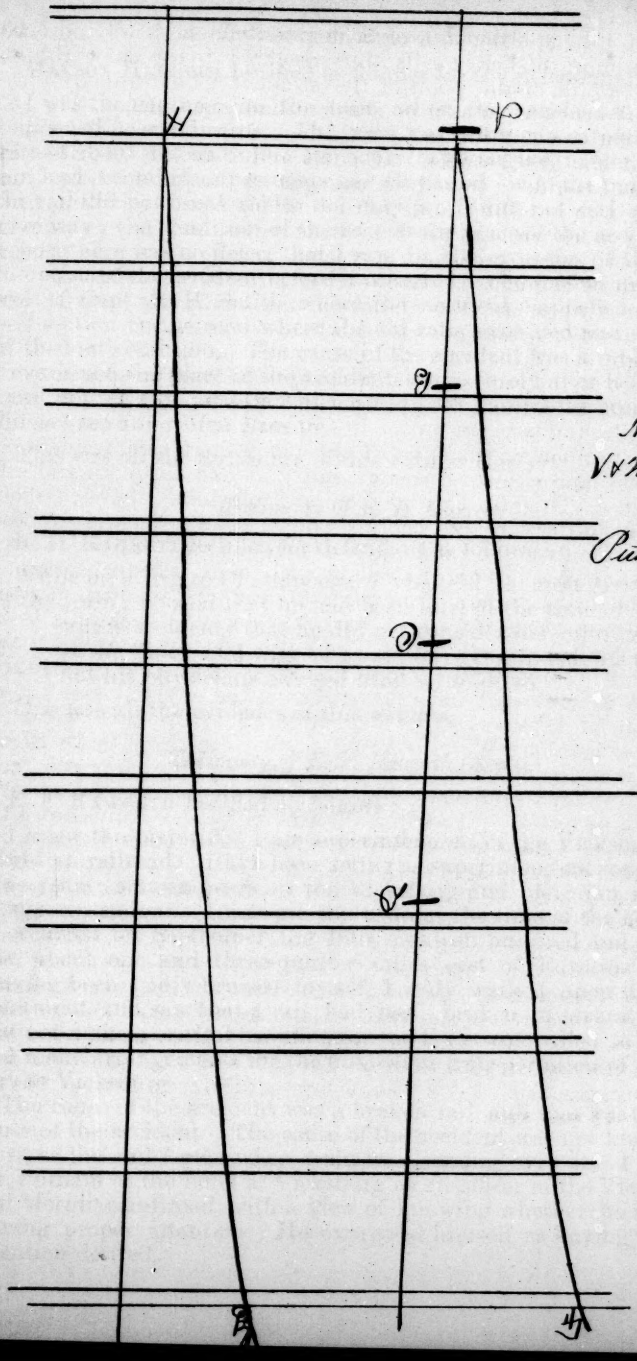
In 1878 the old administration began to lay fish plated rail beginning at Bolton and working west, and at the time of the transfer to the Erlanger syndicate had reached midway, which is four and one-half miles west of Bolton. The Erlanger syndicate, between

the first of June and the 16th of September, had laid two and one-half miles more of heavy rails, thus reaching to a point within a quarter of a mile of the point of the accident. I continued to lay the iron right on as if no accident had taken place. The ac-
57 cident had nothing to do with the continuation of the work, and the gap between this point and Edwards was filled as speedily as I could. I have been engaged in the practical working of railroads, in handling and putting in place, and watching and inspecting work while in use for fifteen years, and have observed that the per cent. of breakage is greater in rails seemingly perfect than in those laminated. Lamination is usually an indication of perfection of fiber, and the absence of the conditions favorable to disintegration or breakage of the fibers of the rail.

The light or original rails had been taken up in 1874 and 1875 and carried to the company's shops, where the laminated and worn places were cut out and the good portions welded together in suitable lengths and sent out on the line of road to be put down again, and were put down. The part of the road where this accident occurred was laid with those welded rail and had a smooth and safe appearance. This was English iron and originally weighed about 42 pounds to the yard and had worn down so as to weigh, I suppose, 39 or 40 pounds to the yard. The ties on our road extend twenty-one inches beyond the rail at each end. Chrystilization, or
58 the disintegration of the parts of iron or rail, often happen almost instantly, and I have known new steel rails to be broken, when first used, by the first train passing over them, and sometimes in throwing them from the cars. As to what causes these breaks I do not know, and I do not know that anybody else knows. It is one of those occult, hidden forces of nature that we cannot touch nor handle. We only know it and recognize it by its effects. Where rails rest on cross-ties the rails are bright underneath from motion and are never rusty, and this is true whether the cross-tie be sound or rotten. The friction caused by passing trains keeps the rail bright. I have not studied iron as a study since I was in college, about 40 years ago, but I think there is such a thing as chrystalization of iron. Have read some of the encyclopedias on the subject since I came to Atlanta. The printed pamphlets of 1877 & 1880 shown me are the reports of Mr. Raworth, sup't of the defendant. The superintendent inspected the road, and in this way, and from the road master under him, who made reports to him, got information about the condition of the road. Old rails are more liable to break than new ones. The heaviest part of the traffic passed over this part of the road in 1877 & 1880; 2 freight and one passenger train each way per day. I don't know how much of the head of the rail that broke was worn.

(Here follows diagram, marked p. 59.)

Diagram used by R N Smith in delivering his evidence.



60 *Testimony of Mayson Herbert.*

MAYSON HERBERT testified as follows for the defendant:

I was the engineer on the train when the accident in question happened near Edwards. The train was being run carefully at the rate of about fifteen miles an hour. The engine, tender, baggage car, and second-class passenger car all passed over the rail safely; the rail did not break under the engine; I did not feel anything give way; the condition of the road at the place of the accident was good; there was no defect that I saw in the cross-ties or the rail at the point of the accident before it occurred. The section under control of Capt. R. H. Smith, where the accident happened, was the best section on the road where the old rails remained and was kept in the best condition. The cause of the accident was a broken rail. I examined the place of the accident immediately after it occurred. I did not see any cross-tie which could have caused the accident. I did not see any rotten cross-tie.

This was all the testimony of this witness Herbert.

Testimony of R. H. Garrett.

R. H. GARRETT testified for defendant as follows:

While on a trip to Chattanooga I chanced to meet Mr. Putnam on the train; he said that he had been hurt at the time of the Edwards accident; that he did not consider his injuries serious
61 at the time; and that he would have continued his trip had not his physicians advised him not to do so.

This was all the evidence of this witness.

Testimony of E. F. Raworth (Sup't).

E. F. RAWORTH testified as follows:

I knew the plaintiff. I am superintendant of the Vicksburg and Meridian railroad. Have been acting as superintendant for twenty-nine years; sixteen years on the Vicksburg and Meridian railroad as superintendant. I was on the train at the time of the accident. It occurred on September the 16th, eighteen hundred and eighty-one, about one and three-quarter miles east of Edwards' depot. Having been badly bruised myself, I only walked upon the embankment, and saw that a rail had been broken in several pieces. Did not make a critical examination, as I was compelled to return and make arrangements for the immediate transportation of passengers to Vicksburg.

The cause of the accident was a broken rail, and that was the sole cause of the accident. The cause of the accident was not known to exist, as the rail broke when train was passing over it. I visited Mr. Putnam at the hotel at Vicksburg as an officer of the Vicksburg and Meridian railroad, with a view of knowing whether he was receiving proper attention. He expressed himself as having all the attention desired.

while the jury was at the bar, as a misrecital of the testimony of the witness, whose deposition was read on the hearing, and assigns the same as error, and prays that [the] court will certify and sign said exception.

The court also instructed the jury as follows:

67 "The older a rail gets, as the section-master says, the more liable it is to break, because it gets thinner by wear and it gets brittle, as these actions upon it are continued for a long time."

The defendant excepted to this charge while the jury was at the bar, and assigns the same as error, and prays the court to sign and certify the same.

The court also charged the jury as follows:

"Now the testimony of two of the plaintiff's witnesses are persons who examined this tie and these pieces of iron right at the time, perhaps before even Mr. Smith did, at any rate right at the time. One of them seems to be a man who knows something about railroads. Mr. Roach says that the rail was badly rusted and had the appearance of having lain upon a rotten or wet cross-tie; and then there is the testimony of Mr. Carrington, who says that the proximate cause was a rotten cross-tie."

Defendant's counsel excepted to this charge while the jury were at the bar, and assigns the same as error, and prays that the court sign and certify said exceptions.

The court also instructed the jury as follows:

"If it was a bad cross-tie, and it was the cause of the accident, why then the negligence of the road would be very great or the negligence of the employees, because that was a thing anybody
68 could see. Three of the witnesses say that it was a bad cross-tie."

The defendant's counsel excepted to this charge while the jury were at the bar, and assigns the same as error, and prays the court to sign and certify said exceptions.

The court also delivered the following charge to the jury:

"If the rotten cross-tie was the primary cause, why there was a plain, open case of negligence."

The defendant's counsel excepted to this charge while the jury were at the bar, and assigns the same as error, and prays the court to sign and certify said exceptions.

The court also delivered the following charge to the jury:

"If you put an old man to do a young man's work you ought to be sure that the old man is sound; you ought to test him. And so if you put an old rail forty years old, that has been run over by train after train for forty years, and put that to do the work of a piece of

iron. I believe there is no testimony about the average age, but it is a question of universal notoriety that old rails are more apt to break than new, as Mr. Smith said in his testimony."

Defendant's counsel excepted to this charge while the jury were at the bar, assigns the same as error, and prays the court to sign and certify this exception.

69 The court also charged the jury as follows:

"I would not be prepared to say what they ought to do in a case like this. If a rail be forty years old perhaps they ought to send a man around every day to hammer it. I do not say that this would be their duty; I suggest that to you for your consideration, because this is extraordinary to use a forty years' old rail. There is no evidence that they did anything more with that than they did with any other rail."

To this charge of the court defendant's counsel excepted while the jury were at the bar and assign the same as error, and pray the court to sign and certify said exception.

The court also charged the jury as follows:

"In this case, so far as the salary is concerned, the presumption would be that he had lost his salary. That might be computed, but there is no evidence about it. What the truth is about that we don't know, but he having lost his time the presumption is he lost his pay, and that would be another element of damage which you could ascertain with certainty."

Defendant's counsel excepted to this charge while the jury
70 were at the bar and assign the same as error, and pray the court to sign and certify said exception.

The court made the following charge to the jury:

"The company is bound to give him an annuity of the amount he has been damaged by the year for a period equal to the expectation of plaintiff's life."

Defendant's counsel excepted to this charge while the jury were at the bar and assign the same as error, and pray the court to sign and certify said exception.

After the charge of the court the jury retired and returned a verdict for the plaintiff against the defendant for sixteen thousand dollars, which the defendant says is excessive, and then excepted and now excepts to said verdict as excessive.

And thereupon the said defendant prayed the said judge to sign and certify this bill of exceptions containing the said several matters and exceptions as set out, which exceptions were taken by the defendant at the time and in the manner stated above, all the evidence taken on the trial of said case being hereinbefore set out; and the said judge did thereupon, at the request of counsel for said
71 defendant, sign and certify this bill of exceptions pursuant to law, and the same is hereby signed and certified, and made a part of the record *nunc pro tunc*.

I direct that my entire charge be copied and sent up by the clerk of this court as a part of the record in this case.

This May 4th, 1883. H. K. McCAY,
U. S. Judge.

Filing.

Filed in the clerk's office May 4th, 1883.

R. E. BOYD,
Deputy Clerk.

Petition for Writ of Error.

UNITED STATES OF AMERICA, *ss:*

Circuit Court for the Northern District of Georgia.

To the honorable justices of the Supreme Court of the U. S.:

And now comes the Vicksburg and Meridian Railroad Company, by Mynatt and Howell, its attorneys, and complains that in the records and proceedings, and also in the rendition of judgment in a suit between Israel Putnam, plaintiff, and the Vicksburg and Meridian R. R., defendant, tried in the circuit court of the United
72 States for said northern district of Georgia, at March term thereof, A. D. eighteen hundred and eighty-three, and in which judgment was rendered against said railroad company on the 28th day of April, A. D. eighteen hundred and eighty-three, manifest error hath intervened, to the great damage of the said Vicksburg and Meridian Railroad Company.

Wherefore the said railroad company prays for the allowance of a writ of error and such other process as may cause the same to be corrected by the Supreme Court aforesaid.

MYNATT AND HOWELL,
Attorneys.

ATLANTA, *May 17th*, 1883.

A writ of error is allowed in the above-mentioned case to operate as a supersedeas, on the plaintiff in error giving bond conditioned according to law, and payable to the said Israel Putnam, in the penalty of twenty thousand dollars.

W. B. WOODS,
Circuit Justice Fifth Circuit.

Filing.

Filed in office May 15th, 1883. R. E. BOYD,
Deputy Clerk.

73 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the circuit court of the United States for the northern district of Georgia, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court before you,

between Israel Putnam, plaintiff, and The Vicksburg and Meridian Railroad Company, defendant, a manifest error hath happened, to the great damage of the said The Vicksburg and Meridian Railroad Company, as by its complaint appears, we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the said Supreme Court, the 12th day of June, in the year of our Lord one thousand eight hundred and eighty-three.

[SEAL.] A. E. BUCK,
Clerk of the Circuit Court of the United States.

Allowed by—
W. B. WOODS,
Circuit Justice 5th Circuit & Associate Justice U. S. Supreme Court.

74 [Endorsed:] The Vicksburg and Meridian R. R. Co., pl'ff in error, *vs.* Israel Putnam, def'd't in error. Writ of error. Approved and filed in office June 12, 1883. A. E. Buck, clerk.

75 *Bond.*

Supreme Court of the United States.

ISRAEL PUTNAM *vs.* THE VICKSBURG AND MERIDIAN R. R. CO.

Know all men by these presents, that we, The Vicksburg and Meridian Railroad Company and Alexander McDonald and James Espy, of the city of Cincinnati, State of Ohio, are held and firmly bound unto Israel Putnam, of Fulton county, Georgia, in the sum of twenty thousand dollars, to be paid to the said Israel Putnam, his executors or administrators; to which payment, well and truly to be made, we bind ourselves, and each of us, jointly and severally, and our and each of our heirs, successors, executors, and administrators, firmly by these presents.

Sealed with our seals, dated this first day of June, 1883.

Whereas the above-named Vicksburg and Meridian Railroad Company hath prosecuted a writ of error in the Supreme Court of the United States to reverse the judgement rendered in the above-entitled action by the circuit court of the United States for the northern district of Georgia:

Now, therefore, the condition of the obligation is such, that
76 if the above-named Vicksburg and Meridian Railroad Company shall prosecute its said writ of error to effect, and an-

swer all costs and damages if it shall fail to make good its plea, then this obligation shall be void; otherwise, to remain in full force and virtue.

VICKSBURG AND MERIDIAN RAILROAD COMPANY, [SEAL.]
By OTTO PLOCK, *President.*
ALEX. McDONALD. [SEAL.]
JAS. ESPY. [SEAL.]

Sealed and delivered in presence of—
H. B. TAILOR,
As to McDonald.
JOHN A. PENN,
As to Espy.
SAM'L S. CARPENTER,
As to McD. and E.

UNITED STATES OF AMERICA, *Southern District of Ohio,* } *ss:*

Alexander McDonald and James Espy, being duly sworn, depose and say, and each for himself saith, that he is worth the sum of twenty thousand dollars over and above all his just debts and liabilities and all exemptions allowed by law.

ALEX. McDONALD.
JAMES ESPY.

Sworn to before me, this 1st day of June, 1883.
[SEAL.] SAM'L S. CARPENTER,
U. S. Com'r, Southern Dist. of Ohio.

I approve the above bond and the sufficiency of the sureties thereto. Approved June 12th, 1883, to operate as a supersedeas.

W. B. WOODS,
Associate Justice U. S. Supreme Court.

Filing.

Filed in clerk's office June 12th, 1883.

A. E. BUCK, *Clerk.*

77 UNITED STATES OF AMERICA, *ss:*

To Israel Putnam, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on the second Monday in October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the northern district of Georgia, wherein the Vicksburg & Meridian Railroad Company in plaintiff and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Morrison R. Waite, Chief Justice of the United States, this the 12th day of June, in the year of our Lord one thousand eight hundred and eighty-three.

[SEAL.] W. B. WOODS,
Associate Justice U. S. Supreme Court.

78 I, Hoke Smith, att'y for Israel Putnam in the case mentioned in the within citation, acknowledge due and legal service of the within citation, and the reception of a copy thereof. I waive all further or other service.

June 15th, 1883. HOKE SMITH,
Attorney for Israel Putnam.

Witness:
A. E. BUCK,
Clerk of the Circuit Court of the U. S.
for the Northern District of Georgia.

[Endorsed:] Circuit court of the United States for the northern district of Georgia. Vicksburg & Meridian Railroad Company, pl'ff in error, *vs.* Israel Putnam, def't in error. Citation. Filed in clerk's office June 12, 1883. A. E. Buck, clerk. Mynatt & Howell, att'ys for pl'ff in error.

79 UNITED STATES OF AMERICA, } *ss:*
Northern District of Georgia, }

I, A. E. Buck, clerk of the circuit court of the United States in and for the northern district of Georgia, do hereby certify that the foregoing is a true, full, correct, and complete transcript of all the proceedings in the case of Israel Putnam against The Vicksburg and Meridian Railroad Company now on file and remaining of record in my office.

In testimony whereof, I hereunto set my hand and the seal of the said circuit court at Atlanta, Ga., this the 20th day of June, A. D. 1883.

[SEAL.] A. E. BUCK, *Clerk.*

Endorsed on cover: N. Georgia C. C. U. S. No. 542. The Vicksburg and Meridian Railroad Company, plaintiff in error, *vs.* Israel Putnam. Filed 2d August, 1883.

118-545

Office Supreme Court U. S.
FILED
APR 3 1886
JAMES H. McKENNEY,
CLERK.

Robert Clarke & Co., Printers, Cincinnati.] [March, 1886.

Supreme Court of the United States

OCTOBER TERM, 1885.

The Vicksburg and Meridian Railroad Company,
Plaintiff in Error,

No. 250. *v.*

Israel Putnam,
Defendant in Error.

In Error to the Circuit Court of the United States for the Northern District of Georgia.

BRIEF FOR PLAINTIFF IN ERROR.

By GEO. HOADLY,
EDGAR M. JOHNSON, and
EDWARD COLSTON,
Its Counsel.

Robert Clarke & Co., Printers, Cincinnati.] [*March, 1886.*

Supreme Court of the United States

OCTOBER TERM, 1885.

The Vicksburg and Meridian Railroad Company,
Plaintiff in Error,

No. 250. *v.*

Israel Putnam,
Defendant in Error.

In Error to the Circuit Court of the United States for the Northern District of Georgia.

BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT OF CASE.

The action, being for $25,000 damages for injuries to Putnam while a passenger, was begun by attachment in the City Court of Atlanta, Georgia (Record, p. 1). Thereafter, on June 28, 1882, a declaration (Record, p. 3) was filed in the same court, and on July 12, 1882, defendant filed (Record, p. 4) a plea of *not guilty*. On February 2, 1883, the plaintiff in error, defendant below, filed its petition and bond for removal to the Circuit Court of the United States for the Northern District of Georgia, and removal was on February 26, 1883, ordered.

The record was filed in the Circuit Court on March 13,

1883. On February 26 and April 28, 1883, respectively, plaintiff filed amendments to his declaration (Record, pp. 6, 7), one charging aggravating circumstances in support of punitive damages; and the other setting up the amount of his physician's bill.

Trial was had before Hon. H. K. McKay, judge, and resulted in a verdict (on May 28, 1883) for plaintiff, defendant in error here, for $16,000 (Record, p. 14). Judgment seems (Record, p. 14) to have been entered a month prior to the verdict, an inconsistency to which we shall revert hereafter.

ARGUMENT.

The errors complained of are those set out in the bill of exceptions (Record, p. 16, *et seq.*), and also the action of the court below in denying the motion of plaintiff in error, defendant below, for a new trial, on the grounds stated in the motion (Record, p. 15).

I.

We deal first with the exceptions (two in number) to the admission in evidence for the plaintiff of certain tables purporting to show the expectancy of life, that persons in normal health might have at given ages. A witness, General Lewis, was produced (Record, p. 19) for the plaintiff, who testified that he was the agent of the Equitable Life Insurance Company. He was shown a paper by counsel for defendant in error, plaintiff below, purporting to be a life and mortality table, and identified it as the one used by the American Life Insurance Company. The table was then put in evidence, against the objection of plaintiff in error, and will be found on page 20 of the Record.

At the same time plaintiff offered in evidence a table,

Assignment of Errors.

First. The court erred in permitting to go to the jury a life and mortality table, testified to by General Lewis as the one in use by the American Life Insurance Company, without further testimony as to its value as an authoritative work upon the subject.

Second. The court in permitting a table, taken from Reese's Manual, to show the value of annuities on single lives, without evidence of the value of Reese's Manual as an authoritative work upon that subject.

Third. The court erred in admitting the testimony of Atwater, as to the condition of the Vicksburg & Meridian Railroad between Bolton and Edwards, and not confining his testimony as to the condition of said railroad at the place of the accident.

Fourth. The court erred in admitting in evidence extracts from the reports of the superintendent of the Vicksburg & Meridian Railroad to the president of said company, made in the years 1877 and 1880, respectively.

Fifth. The court erred in charging the jury as follows:

"Upon the testimony I charge you as follows: The principal witness for the defendant was a man who was the section master, that is Mr. Smith. If there was a rotten tie there, and he had overlooked it, he would be strongly tempted to conceal it, and put the fault on somebody else."

Again in charging—

"If it was a bad cross-tie, and it was the cause of the accident, why, then, the negligence of the road would be very great, or the negligence of the employés, because that was a thing anybody could see."

Again in charging—

"If the rotten cross-tie was the primary cause, why there was a plain, open case of negligence."

Again in charging—

"But it is insisted by the company that the broken rail came from some secret defect. If you believe that to be

true, and that secret defect could not have been ascertained by proper diligence, for every means must be used to detect it, especially in the case of iron that is very old—if every means had been used to detect it, then the road is not liable."

Again in charging—

"If you put an old man to do a young man's work, you ought to be sure that the old man is sound—you ought to test him. And so if you put an old rail forty years old, that has been run over by train after train for forty years, and put that to do the work of a piece of iron. I believe there is no testimony about the average age, but it is a question of universal notoriety that, as Mr. Smith said in his testimony, old rails are more apt to break than new."

Again in charging—

"I would not be prepared to say what they ought to do in a case like this. If a rail be forty years old, perhaps they ought to send a man around every day to hammer it. I do not say that this would be their duty; I suggest that to you for your consideration, because this is extraordinary to use a forty years' old rail. There is no evidence that they did anything more with that than they did with any other rail."

Again in charging—

"In this case, so far as the salary is concerned, the presumption would be that he lost his salary. That might be computed, but there is no evidence about it. What the truth is about that we do not know, but, he having lost his time, the presumption is he lost his pay, and that would be another element of damages which you could ascertain with certainty."

Again in charging—

"The company is bound to give him an annuity of the amount he has been damaged by the year for a period equal to the expectation of plaintiff's life."

Sixth. The court erred in permitting annuity tables to be taken by the jury into the jury room.

Seventh. The verdict is excessive.

Eighth. The court erred in overruling motion for new trial.

taken from Reese's Manual, whatever that may be, showing the value of annuities on single lives. To this also defendant below, plaintiff in error here, objected; but the table was admitted, and will be found on page 21 of the Record. Of evidence of this kind it is said, in 2 Rorer on Railroads, 1099:

"Respectable and ordinarily accepted life tables, shown to be such, and to be acted on and consulted by business persons, where applicable in the transaction of their own affairs, may be properly introduced to the jury as evidence in actions for personal injuries, as tending to prove in connection with the age of the injured person the probable length or expectancy of life yet remaining to such person, and as a basis arising therefrom, for the estimating the damages consequent upon the injury, in a pecuniary point of view, having reference also to the degree of inability of the injured person, as to future efforts for a support."

In the same work, pages 1167, 1168, and 1176, the rule is stated to be that in actions for causing death

"well-recognized and accredited life tables may properly be received in evidence to the jury in connection with the evidence of the ordinary state of decedent's health," etc.

In Pierce on Railroads, 297, it is said:

"In actions for injuries not resulting in death, life tables are not competent evidence of the probable injury."

And in the note, *Nelson* v. *Railway Co.*, 38 Iowa, 564, and *Simonson* v. *Railway Co.*, 49 Iowa 87, are cited.

In Thompson on Carriers, page 565, sec. 20, it is said:

"It is also competent for the plaintiff to show that the injuries complained of are permanent in their nature—that he will probably not recover from their effects; *and when there is such testimony*, it is not improper to introduce in evidence standard life tables to show the expectancy of life of one of the age of the injured party as a basis upon

which to estimate the amount of damages he should recover."

The italics are ours.

In Hutchinson on Carriers, page 622, sec. 806, it is said:

"The state of health of the party injured is a proper subject of inquiry and proof; also, *in case of death from the injury*, what was the probable duration of his life."

The italics are ours.

These citations from the text books show that the weight of authority favors the rule that life tables are only admissible in cases like the one at bar, when it is shown, first, that the injury has resulted in permanent disability, and, secondly, that the tables offered are generally accredited and authoritative. But in the case at bar, the evidence satisfies neither of these conditions. Upon the nature and seriousness of defendant in error's injury, his medical attendant, Dr. Westmoreland, says (Record, p. 22), persons injured as defendant in error was sometimes get entirely well; sometimes they do not. He could not tell how it would be in plaintiff's (defendant in error's) case. We ask the court to read all of Dr. Westmoreland's testimony on page 22 of the Record. It is brief, and we are confident justifies no inference whatever of more than slight disability, and that not permanent.

The proof of the genuineness and authenticity of the tables introduced in evidence is contained solely in the testimony of Gen. Lewis (Record, p. 19), who says that the table printed on page 20 of the Record is that used by the American Life Insurance Company! Does this prove that the table is generally accepted as a standard and ordinarily used by persons having to do with like matters? It would have been more satisfactory, even, if Gen. Lewis had been the agent of the American Life Insurance Company. But

no, he is the agent of the Equitable Life Insurance Company, and, having identified a paper shown him as the table used by another company, with which for aught that appears he has no connection, the paper is allowed to be introduced. There is not so much as proof that the witness's experience, or occupation, or skill, qualified him to identify any tables as well accredited. We are not told what is the American Life Insurance Company, whether an extensive or a small affair. In fact, the witness says nothing as to this paper, except that it was the table used by the American Life Insurance Company. Moreover, the witness had not qualified to speak to the authority of such papers. He testified that he was the agent of the Equitable Life Insurance Company. How wide the scope of his agency, how extensive his experience, or whether its duties included familiarity with the details of the calling of an actuary, nowhere appears. In some cases it is not doubtful that books of authority may be used to throw light upon questions of fact. For example, it is sometimes permitted to use in this way works on medicine. But has it ever been seen that a book has been produced by counsel to a witness who has shown no special fitness for giving an opinion upon its value or authority, and then having been by him identified as a book consulted—not by himself, even, but—by another person, has been allowed to go in evidence to the jury? We take it, not; for the mere statement of such a hypothesis makes manifest its absurdity. Yet what happened on the trial of the case at bar was exactly its parallel.

What we contend for is more than sustained by the language of Brett, J. (now Master of the Rolls), in his opinion in the case of *Rowley's Ex.* v. *Railway Co.*, L. R., 8 Exchequer, 221. In that case, for the purpose of

proving the value of an annuity, a witness, one Adamson, an accountant, was called, who, after having given evidence as to the income of deceased, was asked whether he was acquainted with the business of life insurance. He said that he was, and was then permitted to refer to certain life-tables and give evidence. It will be seen that Adamson's qualifications were much more clearly shown than Lewis's in the case at bar. But of them Brett, J., said (page 228):

"In this case, it seems to me, that the bill of exceptions does not properly raise the point whether the evidence of the witness, Adamson, ought to have been rejected on the ground that he was not such a skilled witness as could properly be admitted to give evidence on the question of science proposed to him. . . . . It becomes therefore unnecessary, as it seems to me, to decide whether Adamson, an accountant, was such a witness as could properly be allowed to give evidence on a matter which, if it be matter of science, is so in and according to the business of actuaries. It is sufficient to say, that, having regard to what was said by Pollock, C. B., and by Alderson and Ralfe, B. B., in *Bristow* v. *Sequeville*, I think it doubiful whether he was a competent witness."

The case of *Bristow* v. *Sequeville* referred to will be found in 5 Welsby, H. & G. (Exchequer), 275. It is matter of common knowledge that agents of insurance companies are not all of one kind. That to say one is the agent of an insurance company is to raise a presumption that he has any skill as an actuary can not be maintained. At most, such an agent needs but know what premium his company charges for insurance to a given amount upon the life of a person of a given age. The work of calculating probabilities and the like is a calling of itself, and an agent whose duty, it may well be, is only to solicit business or receipt for premiums, can not upon that showing testify as an expert. The second table—that found at page 21 of the

Record—was preceded by an even more meager showing of authority and value. As to this the Record, p. 19, says:

> "The plaintiff also, at the same time, offered in evidence a table from Reese's Manual, entitled a table showing the value of annuities on single lives according to the Carlisle table of mortality, to which defendant objected, on the same ground stated in the above exception, but the court overruled the objection and admitted the same in evidence, to which action of the court the defendant excepted them," etc.

We do not know what "Reese's Manual" is, nor is there any thing in the record to explain. No witness speaks to its character or contents, and the table taken from it is described as deduced from another table not in evidence. We are not told how widely accepted, or whether at all, are the deductions of Reese's Manual, nor is it even in evidence that the table from which the deductions are made is "generally accredited." How is such a table so introduced of more value, or authority, or better evidence than any other arrangement of figures that might be made? Yet it was admitted by the court below, and the jury was charged that the defendant was bound to give the plaintiff, among other things, an annuity of the amount he had been damaged by the year, for a period equal to the expectation of plaintiff's life. (Record, p. 13).

We submit that neither of these tables was competent, either upon principle or upon authority, for the reasons set forth, namely, first, that no permanent disability or likelihood thereof, of the defendant in error is shown by the testimony; secondly, that the witness, in connection with whose testimony the tables were introduced, is not shown to be in any respect qualified to speak to their accuracy, credit, or value; thirdly, that it nowhere appears that the tables themselves have been, or are used accepted, or generally accepted among persons whose affairs require

them to consult such schedules; and lastly, because annuity tables like that from Reese's Manual are in no circumstances admissible, however authoritative they may be. And we submit that their admission in evidence was error for which the judgment of the court below should be reversed.

The evidence of one Atwater, found at pp. 23 and 24 of the Record, was the subject of the next exception. Atwater testified that he had traveled twenty-four or twenty-five times over plaintiff in error's road, and knew where Bolton was, and where Edwards (the accident wherein Putnam, the defendant in error, is alleged to have been injured, occurred between the stations called Bolton and Edwards, respectively). He was asked the condition of the road between Bolton and Edwards, and was, against the objection of plaintiff in error, permitted to reply. We insist that this admission was error.

The condition of the road in general was not pertinent to the issue, which was merely whether there existed at the place of the accident a defect which caused the accident, and whether it was such a defect as the plaintiff in error might in the exercise of due care have discovered and remedied. This surely could not be proven by testimony as to the general condition of the road between two stations. The irrelevancy of this particular witness's testimony is shown more clearly by what he further says (Record, p. 24), on cross-examination:

> "Only looked at the track at stations. Never examined the track where the accident occurred. I do not know what the condition of the rails was at the place of accident. · · · I live in Atlanta; have no railroad experience except as a traveler."

We submit that Atwater's testimony was incompetent and misleading, and that its admission was error, as was the

ruling of the court below refusing to rule it out. (Record, p. 24).

On pages 24 and 25 of the record will be found two extracts purporting to be from reports made in 1877 and 1880, respectively, by the superintendent of plaintiff in error's railway to its president. These extracts were admitted over the objection of plaintiff in error.

The extract from the report of 1877 (Record, p. 24), was incompetent, because it was made at such a distance of time (more than four years) from the date of the accident (September, 1881), that its statements, however specific at the time of making, could in no way be taken to apply to the condition of affairs four years later. But, as a matter of fact, neither of the extracts admitted in evidence is more than a general statement of the condition of portions of plaintiff in error's railway, and what these portions were the extracts do not specify. The 1877 extract speaks to 35 miles of road, the 1880 extract to 25 miles of road. We see no inference to be drawn from this but that ten miles less of the plaintiff in error's railway was, in 1880, in the condition described than in 1877. And valueless as such an inference is the vague and indefinite lauguage of these reports was well adapted to mislead the jury, as it was doubtless calculated it would do. The plaintiff in error's railway runs from Vicksburg to Meridian, a distance, as the map will show, of about 140 miles. One of these reports speaks to 35 miles, the other to 25 miles of track; of more than 100 miles of track neither of them makes mention. What then is the relevancy of such papers? We insist that they are both incompetent, and that their admission was error, for the reasons, first, that they were not sworn to or proven in any way to be what they purported; secondly, that they are too remote in date to have any

bearing on the condition of the plaintiff in error's road, or of any part thereof, at the time of the accident; and thirdly, that nothing contained in either of them either appears to or does touch the single defect which caused the accident wherein Putnam was injured, or even that portion of plaintiff in error's railway within which the scene of the accident is included.

II.

CHARGE OF THE COURT.

The exceptions taken by plaintiff in error to the charge of the court, upon which a motion for new trial was founded, are numerous.

The charge is found set out in full in the Record, beginning on page 7. The exceptions taken are found in Record, p. 31 *et seq.*

On page 9 of the Record will be found that portion of the charge to which the first exception was taken. It is as follows:

> "Upon the testimony I charge you as follows: The principal witness for the defendant was a man who was the section master, that is Mr. Smith. If there was a rotten tie there, and he had overlooked it, he would be strongly tempted to conceal it, and put the fault on somebody else."

This seems to us to amount to an instruction to the jury to place no reliance on Mr. Smith's testimony, and to assume that wherever his apparent interest conflicted with his knowledge he would, as a matter of course, testify falsely. It might have been proper to charge the jury to exercise special care in weighing Mr. Smith's testimony,

but to say that he would be strongly tempted to conceal a particular fact was to grossly mislead the jury. Mr. Smith's testimony will be found on pages 25–28 of the Record. He testified at some length and with relation to a variety of matters, but the court saw fit to so charge the jury regarding one matter as to throw discredit on the whole. There is no item of his testimony contradicted by any thing elsewhere in the record, except that Mr. Carrington says (Record, p. 23), that a decayed cross-tie was the primary cause of the accident, while Mr. Smith says (Record, p. 26), that the one decayed cross-tie that he saw was good and sound under and near the rail. Moreover, whether Mr. Smith was likely to be "strongly" tempted to misstate facts, was surely for the jury alone to say. The witness's demeanor and appearance they had seen, and so could judge of. The strength or weakness of a temptation in a given case is not merely relative to the dollars and cents at stake, but also to the character of the person subjected to the temptation. And we think that this court will hold that the language of the court below was erroneous, unjustifiable and misleading.

Almost the same remarks apply to the language of the court in the charge with relation to the testimony of Superintendent Raworth, as follows: "His testimony, therefore, does not amount to much." Was it not for the jury to say what weight should be given to the evidence? Whatever be the limit of proper comment by a court on testimony, it must be on the hither side of such instructions as have been quoted. If not, then the submission of a cause to a jury is a superfluous formality.

We deal next with the exception to the following (Record, p. 9):

"If it was a bad cross-tie, and it was the cause of the

accident, why, then, the negligence of the road would be very great, or the negligence of the employes, because that was a thing any body could see."

The vital question of the case was whether the cause of the accident was a defect such as with due care could have been discovered and remedied by plaintiff in error, for if the defect were latent, and not discoverable by the diligence called for in the circumstances, certainly plaintiff in error had been without fault.

But the court below charged nakedly that the fact of an accident happening from a bad cross-tie raised a conclusive presumption of gross negligence! Because the badness of a cross-tie was a thing any body could see. It requires no expert knowledge either of railways or of timber to perceive how utterly misleading such a charge must be. The decay of wood, as every one knows, may proceed rapidly or slowly, and it may go far without becoming apparent, except by boring into the wood in the very spot. It is impossible to take up and examine, or to bore into, such a multitude of separate timbers as the ties of a railway. Experience, therefore, must be relied on to determine how long a tie may last, and unless a defect in a tie becomes manifest to the eye, it may well be presumed to be good if it have not been laid beyond the designated average period. Even if this were not so, certainly it is not a matter of common knowledge, of which a court can take judicial notice, that the rottenness—or, to use the equivalent of the word of the court below—the badness of a cross-tie is such a defect as must be at once apparent to any body. A defect in a piece of timber, buried, as a cross-tie is, in the earth, and covered for the most part with ballast, its surface, where exposed, blackened, and discolored by the weather, may go far before becoming apparent, even to a

close inspection. In the case at bar, it was in question whether the accident had been caused by the breaking of a rail, and if, by the breaking of a rail, whether that in turn was due to a defective cross-tie. If the breaking were due to a defective cross-tie, it became at once vital to determine whether the defect was one open and manifest, or one such as with due care might have been discovered and remedied. But the court below gave no room to the jury to decide on the question of fact whether, if the cross-tie was defective, the defect was plainly visible, or concealed and impossible to be detected with due care. It charged (Record, p. 9):

"If it was a bad cross-tie, and it was the cause of the accident, why, then, the negligence of the road would be very great, or the negligence of the employes, because that was a thing any body could see."

These considerations apply with equal force to that portion of the charge of the court which begins with the last paragraph at the bottom of page 9 of the Record. It was duly excepted to (Record, p. 32), and is as follows:

"If the rotten cross-tie was the primary cause, why there was a plain, open case of negligence."

Does not this also take from the jury their rightful duty of determining the question of fact, and instruct them that if they find the rotten cross-tie to have been the primary cause of the accident, nothing is left to them but to find a verdict for the plaintiff? It may be urged that the language of the next paragraph (Record, p. 10) corrects the misapprehension that must, of necessity, arise from the two extracts just quoted. In the second paragraph, on page 10, of the Record, the court below said:

"But it is insisted by the company that the broken rail

came from some secret defect. If you believe that to be true, and that secret defect could not have been ascertained by proper diligence, for every means must be used to detect it, especially in the case of iron that is very old—if every means had been used to detect it, then the road is not liable."

But, aside from the extreme doctrine laid down in this paragraph as to the duty of the railroad company, the language applies only to a rail, and serves not at all to correct the excess into which court had fallen in the preceding portions of its charge.

The portion of the charge next excepted to is contained in the second paragraph of page 10 of the Record. It is as follows:

"If you put an old man to do a young man's work, you ought to be sure that the old man is sound—you ought to test him. And so if you put an old rail forty years old, that has been run over by train after train for forty years, and put that to do the work of a piece of iron. I believe there is no testimony about the average age, but it is a question of universal notoriety that, as Mr. Smith said in his testimony, old rails are more apt to break than new."

And toward the end of the same paragraph the court said:

"I would not be prepared to say what they ought to do in a case like this. If a rail be forty years old, perhaps they ought to send a man around every day to hammer it. I do not say that this would be their duty; I suggest that to you for your consideration, because this is extraordinary to use a forty years' old rail. There is no evidence that they did any thing more with that than they did with any other rail."

In this the court below was misled by an incomplete if not a false analogy. The only testimony as to the use

made of the rail was given by Herbert, engineer of the train whereon Putnam was, who said (Record, p. 29):

"I was engineer on the train when the accident in question happened near Edwards. The train was being run carefully at the rate of about fifteen miles an hour."

And by the railroad company's superintendent, Mr. Raworth, who says (Record, p. 30, par. 1):

"These welded rails, as above described, performed their duty well for the then traffic of the road and speed of trains—sixteen miles per hour for passenger trains and twelve for freight trains.

"At the time of the accident one passenger and two freight trains, each way daily, were running over the road."

From this evidence it will be observed that the old man was not put to do the work of the young one. The work the rail had to do was very light, as may be seen from the number of trains—six altogether each day—and the speed at which they ran, sixteen miles per hour for passenger trains and twelve for freight trains. It would seem that the work was very carefully adjusted to the strength of the worker, even granting the truth of the court's statements. The court below charged the jury, too, that it is extraordinary to use a forty-year old rail. We do not know whether that means that the use of a forty-year old is extraordinary, or that it is extraordinary a rail should last so long. But in either case we contend the court exceeded its province in instructing the jury, that, as a matter of common knowledge, it was extraordinary to use a forty-year old rail. The life of a rail, like that of any other bit of iron, depends not only on its age but upon the manner of its use. In a place where it is subjected to frequent and severe shocks its life must be shorter than under different condi-

tions. For all this, or indeed for any difference in conditions as affecting the durability of iron, the court below virtually instructed the jury to make no allowance, by stating to them that use of a forty-year old rail was extraordinary. And the jury may easily have inferred from this, that the mere having in use such a rail was proof positive of negligence. And that instruction the court gave in the face of the uncontradicted testimony of Mr. Raworth, on page 30 the Record, that

"these welded rails performed their duty well for then (*i. e.*, of the time of the accident) traffic of the road and speed of trains—sixteen miles an hour for passenger trains and twelve for freight trains."

We come now to that portion of the charge which deals with the measure of the damages. To this part two exceptions were taken (Record, p. 33). The instruction first excepted to is found on page 11 of the record, and is as follows:

"In this case, so far as the salary is concerned, the presumption would be that he lost his salary. That might be computed, but there is no evidence about it. What the truth is about that we do not know, but, he having lost his time, the presumption is he lost his pay, and that would be another element of damages which you could ascertain with certainty."

We contend that this instruction was error, to the prejudice of plaintiff in error, and adapted to mislead the jury. In the case of *Railway Co.* v. *Arms*, 91 U. S. 489, this court decided that damages in cases of personal injury were to be confined to indemnity to the injured party in the absence of elements of malice or reckless indifference. We deny that there is to be presumed any thing as to elements of damage; every thing must be proved. The

court below said that there was no evidence that Putnam had lost his salary, but that the jury were to presume it. But even in his declaration (Record, pp. 3 and 4) Putnam did not allege that he had lost his salary, and no more did he attempt to prove that he had. To hold that an absolute omission to allege or prove a particular sort of damage raises a presumption that the party has suffered that damage is to shift the burden of proof from the plaintiff to the defendant. Under such a ruling the defendant would be obliged to prove a negative before the affirmative had been shown. If a plaintiff has suffered damage, must he not prove it? Is it to be presumed that one lost his purse because he says nothing of such loss when complaining of the loss of his trousers? It is no violent supposition to assume that Putnam was paid his salary during his illness, and if so, surely he is not entitled to have it paid him over again. In his declaration (Record, p. 4) he says he was confined to his room for months, unable to do any thing but attend to his injuries; that his breathing was made difficult, his capacity to work and endure fatigue was impaired and lessened one-half. Do these allegations, even by implication, convey the idea that he lost his salary? As to the evidence, consider what the court, in a charge, none of the errors of which will surely be set down as too favorable to the plaintiff in error, said of that. On page 11 of the Record the court said:

"It did not appear whether this man lost any thing or not by the loss of time—whether he lost his salary. The company would not be bound to pay him, perhaps, for his salary, if he did not perform his duty. There might be actual damage for the loss of time, if there has been any sustained, but you can not imagine expenses unless they are proven."

Can there be conceived any thing more likely to mislead the jury?

"The company would not be bound to pay him, perhaps, for his salary, if he did not perform his duty."

Would the company be bound to pay him if he *had* performed his duty? Or would not his employers be obliged to pay him for his labor; and in such case would the company be called upon to pay him over again? It is difficult to deal seriously with such a charge as this, no part of which is unobjectionable, except the last clause of the last sentence, "but you can not imagine expenses unless they are proven." And in the next paragraph even that is qualified so as to destroy its value, for there the court said:

"In this case, so far as his salary is concerned, the presumption is that he lost his salary."

Is not this to say that the jury may imagine expenses that are not proven? We perceive no principle upon which any such presumption may be allowed. The loss of salary, if it occurred, was a fact peculiarly within the knowledge of the defendant in error, easy of proof by his own testimony and by that of his employer. We contend that if any presumption is to be indulged, it is that he lost no salary, in the total absence of averment as proof of loss.

The last exception to the charge was to the language found in the first paragraph on page 13 of the Record. The words were as follows:

"The company is bound to give him an annuity of the amount he has been damaged by the year for a period equal to the expectation of plaintiff's life."

The court desired opposing counsel to mark the table,

which was done, although the mark does not appear in the Record here. The natural inference would be, and doubtless it was, that which the jury drew, that the jury were to take this particular table, and from it calculate the present value of an annuity equal to the amount in which plaintiff had been damaged by the year, taking his expectation of life to be that set down for men of his age in the other table. The objections to this are several:

First, the evidence did not show that during the rest of his life, plaintiff would be even partially incapacitated for his ordinary employment. Indeed, the only expert witness who could be supposed able to forecast the future, Dr. Westmoreland, defendant in error's medical attendant, said (Record, p. 22), that in such cases the injuries sometimes get worse, and sometimes get well, and that he could not say how it would be in plaintiff's (defendant in error's) case. And unless the jury should find (which the court did not instruct them they must first do) that the plaintiff had been in some measure *permanently* incapacitated, the plaintiff in error could not, under the widest construction of its liability, be held to pay for the whole remainder of defendant in error's life.

Secondly, it can not be contended that, in any case, the plaintiff in error was liable to defendant in error for the present value of an annuity calculated upon any principle. The damage to Putnam was what he had lost or must lose by reason of his injuries, using "lose" and "lost" in a wider than the common meaning.

An annuity is the exact converse of an insurance on life. The cost of an annuity is directly as the expectation of life, while the cost of life insurance is inversely as the expectation of life. In other words, the less one's expectation of life the less the cost of an annuity, while the

greater his expectation of life the less the premium for life insurance. If, then, the defendant in error is to be given an annuity, it should be according to this expectation of life as diminished by the accident, not as it was before that occurred. And to give defendant in error a life annuity at the rate of his income before the accident, is to fail to take into account all the accidents that may befall a man of business—the chances of failure, the diminution of his powers by increase of years, the change in business methods that may throw him out of employment. All these are things easily incident to the career of any one, and an illustration of the last, *i. e.*, changes in business methods, may be found in the consequences of the passage, about a year since, in New Hampshire, of a valued policy law. Immediately upon the passage of that law, it is notorious that insurance companies withdrew from business within the state, and refused to renew policies as they expired. In New Hampshire the adjuster's occupation is gone.

The third objection is that the words of the court taken in connection with the admission of the two tables in evidence, and the direction to opposing counsel to mark one of them for the jury, amount to a direction to the jury in case they find for the plaintiff—and it may be said that the whole charge assumes that they will do this—to render a verdict for the present value of a life annuity calculated according to the tables admitted as aforesaid. We have already dealt with the admission of these tables in evidence, in the earlier portion of this brief. It remains now to say that, even if they were properly in evidence, the annuity table never should have been considered by the jury at all, but only the life-table. If the annuity table is calculated, as it is said but not shown to be, upon the Car-

lisle Tables, it refers to annuities sold by the Government of Great Britain. These annuities, it is obvious, are as certain as any thing human can be, and do not therefore stand upon the same footing as annuities to be paid by corporations or private persons. Their cost is and must be higher in proportion to the excellence of the security. The annuity which the court below charged the jury should be given to defendant in error, ought surely to have been calculated according to the likelihood, taking all factors into account, of his earning the same rate for the rest of his life as he had earned for an indeterminate period before his injuries. Will it be urged that this security is as good as the promise of the British Government? If not, then its present value must be calculated upon a different basis from the Carlisle Tables, and the direction to the jury to take these tables as conclusive evidence of value was erroneous, and misleading to the prejudice of plaintiff in error.

In the case of *Rowley* v. *Rwy. Co.*, L. R., 8 Exch. 221, Brett, J., in his opinion at page 231, says:

"A direction which leaves it open to the jury to give the present value of an annuity equal in annual amount to the income lost for a period supposed to be equal to that for which it would have continued if there had been no accident, is a direction as it seems to me, leaving it open to a jury to give the utmost amount which they think is equivalent for the pecuniary mischief done, and such a direction is a misdirection according to law. · · · If it be wrong in a jury to give an amount founded on a calculation of the present value of an annuity, any evidence given solely for the purpose of enabling a jury to make such a calculation seems to me to be necessarily misleading and legally irrelevant."

The language of Brett, J., states our contention fully and fairly, and we think it will not be denied that the language of the court in the case at bar comes within what

Brett, J., describes as a "a misdirection according to law." And paraphrasing what he says further on the same page, 231, it seems to us that the evidence in the case at bar, which was given and received, notwithstanding objection taken to it, was given solely for the purpose of inviting the jury to found a calculation upon it of the price of an annuity, a calculation upon which they were not legally entitled to enter, and that a direction such as the court below gave as to the duty of the jury to make such calculation was erroneous, and prejudicial to plaintiff in error.

In *Scheffler* v. *Minneapolis and St. L. Rwy. Co.*, 19 Am. and Eng. R. R. Cases, 173, the court said that life tables—not annuity tables be it observed—might be received in evidence under proper restrictions. But they say (p. 175):

> "Such tables are, however, not conclusive, for there is not only a considerable variance in different tables, but they are not so compiled as to show the probable duration of life under any and all circumstances, but under particular conditions, so that their evidentiary value in a given case is largely analogical. This will be more apparent upon reference to what is said of such tables in Williams' Case, 3 Bland. Ch. 186."

In the case at bar, the court ignored the analogical value of the life table, and made it, with an annuity table which never should have been admitted at all, conclusive.

EXCESSIVE AMOUNT OF VERDICT.

Upon this point we think it not necessary to dwell at great length. Sixteen thousand dollars as damages for such injuries as Putnam received we think manifestly excessive. In the accident three or four of his ribs were broken and his collar-bone. His medical attendant, speaking to the time of the trial (April, 1883), says (Record, p. 22):

"Sometimes they (such injuries) get entirely well; in other cases they do not. Witness could not tell how it would be in plaintiff's case. Plaintiff attempted to travel on cars too soon, and came back broken down. He is able to travel on the train now; may give him some pain at times," etc.

This does not picture a permanent disability or even a disability of very high degree, yet the jury found a verdict for a sum which, taken as principal, would, at six per cent interest, yield plaintiff $960 a year for the rest of his life, or nearly one-fifth of the sum his declaration asserts he was making at the time of the accident.

For an explanation of the exorbitant amount of the verdict the misleading and erroneous instructions of the court below are, we think, sufficient to account, but in any case the sum given is far more than a reasonable compensation to the plaintiff for his injuries. This court has said, in *Arms* v. *Railway Co.*, 91 U. S. 489, that to justify damages greater than a reasonable compensation for the injuries received, there must have been some willful misconduct, or that entire want of care which would raise the presumption of a conscious indifference to consequences. In the case at bar nothing of the kind was or can be imputed to the plaintiff in error.

Before concluding this brief, we desire to call the attention of the court to the fact that the printed record in the cause shows (see Bill of Exceptions, Record, p. 16) the trial to have taken place on April 28, 1883, the judgment to have been entered (see Record, p. 14) April 28, 1883, and the verdict to have been rendered (see Record, p. 14) May 28, 1883. If these dates be those of the originals, as it is to be presumed they are, the judgment was entered before verdict rendered, and having no verdict whereon to rest, it can not stand.

For the reasons set forth herein, and for the other errors to the prejudice of the plaintiff in error set forth in the bill of exceptions and motion for new trial herein, we ask that the judgment of the court below be reversed.

Respectfully submitted,

GEORGE HOADLY,
EDGAR M. JOHNSON,
EDWARD COLSTON,
Counsel for Plaintiff in Error.

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Supreme Court of the United States

OCTOBER TERM, 1886.

(No. 250 AT OCTOBER TERM, 1885.)

The Vicksburg and Meridian Railroad Company,
Plaintiff in Error.

No. 17.] *vs.*

Israel Putnam,
Defendant in Error.

In Error to the Circuit Court of the United States for the Northern District of Georgia.

REPLY OF PLAINTIFF IN ERROR TO SUPPLEMENTAL BRIEF OF DEFENDANT IN ERROR.

By GEO. HOADLY,
EDGAR M. JOHNSON, and
EDWARD COLSTON,
Counsel for Plaintiff in Error.

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In Error to the Circuit Court of the United States for the Northern District of Georgia.

REPLY OF PLAINTIFF IN ERROR TO SUPPLEMENTAL BRIEF OF DEFENDANT IN ERROR.

By leave of court granted at the last term, we submit the following considerations in reply to the supplemental brief filed in behalf of defendant in error:

FIRST.

Counsel for defendant in error says that the language of the court below when he said in his charge (Record, p. 13):

"The company is bound to give an annuity of the amount

he has been damaged by the year for a period equal to the expectation of the plaintiff's life,"

is to be taken only in a Pickwickian sense. It is implied that the jury were not misled, for, after all, the court did not mean what he said. Yet this language was only the clinching of the nail, for the court had already charged (Record, p. 11):

"then find out how much he is damaged every year, and then find out from the table which you will have out before you how much one dollar of annuity to the end of his expect (*sic in orig.*) is worth, and multiply them together."

What could the jury possibly have inferred from this language but that they must take the yearly earnings of the plaintiff to be an annuity, the present value of which, calculated rigidly, according to the tables admitted in evidence, he was entitled to?

On page 11 of the Record the court said:

"In this case . . . the presumption is he lost his pay, and that would be another element of damage which you could ascertain with certainty."

Surely there is no such presumption, and if there be the jury ought to have been warned that the period of disability only could be taken into account. As the charge stands the jury may easily have supposed that the loss of pay was to be presumed to begin at the date of the injury and continue until the death of the defendant in error.

The Record does not show that the defendant in error is permanently disabled in any degree, and his own testimony (Record, p. 16), shows that he resumed his calling in the middle of January, 1882, at which time therefore his total disability ceased and he became able to work. Taking

all these facts and the language of the court below, how is it possible but that the jury *must* have believed it necessary, in case of a finding for defendant in error, to render a verdict for the present value of an annuity, calculated from the tables admitted, at the rate of defendant in error's earnings before his injury? We can only be grateful that the court below did not admit the life tables from the Book of Genesis, which are much better vouched for than those actually admitted and would have greatly increased defendant in error's expectancy of life, and so the present value of his annuity.

Counsel for defendant in error says that the verdict of the jury shows that they were not misled. To us it seems that the excessive amount of the verdict shows just the contrary, but upon this we dwelt sufficiently in our first brief.

SECOND.

We still maintain that although the authorities permit the use of life tables properly vouched for by competent witnesses as being authoritative among persons whose affairs necessitate the habitual use of such aids, no authority allows annuity tables to be used.

We are unable to understand counsel for defendant in error's statement that the opinion of Brett, J., in 8 Exchequer, 221, was by way of dissent from the majority of the court. In the result of that case all three judges concurred, and the only dissent—which was upon the point whether the bill of exceptions fairly raised the questions argued—was by Blackburn, J. Upon the point to which we cited the case, namely, the admissibility of annuity tables, Brett and Honyman, JJ., agreed that they were not. It is true we also cited the remark of Brett, J., that he thought it doubtful whether the evidence of Adamson, the

accountant, was properly admitted to the authenticity of the life tables, but Honyman, J., in his opinion on page 233 says:

" . . . I purposely abstain from expressing any opinion on the other exceptions to the Lord Chief Baron's ruling and to the admissibility of Mr. Adamson's evidence,"

which we take to be at least no assent to the opinion of Blackburn, J., on that point. We again direct the attention of the court to the opinion of Brett, J., in *Rowley* v. *Railway Co.*, 8 Exchequer, 221, and particularly to what is said, page 231:

"A direction which leaves it open to the jury to give the present value of an annuity equal in annual amount to the income lost for a period supposed to be equal to that for which it would have continued if there had been no accident is a direction, as it seems to me, leaving it open to a jury to give the utmost amount which they think is equivalent for the pecuniary mischief done, and such direction is a misdirection according to law. And such, in my opinion, was the direction in the present case of the Lord Chief Baron. If it be wrong in a jury to give an amount founded on a calculation of the present value of an annuity, any evidence given solely for the purpose of enabling a jury to make such a calculation seems to me to be necessarily misleading and legally irrelevant. It is irrelevant to any decision to which the jury ought to come. It is, in the words of Lord Mansfield, in *Carter* v. *Boehm* (1 Sm. L. C., 6th ed. 490), evidence to which the jury ought not to pay the least regard. Such is and must be irrelevant, and therefore is not evidence. It seems to me that the evidence in this case, which was given and received notwithstanding objection taken to it, and to which reception the first exception is pointed, was given solely for the purpose of inviting the jury to found upon it a calculation of the price of an annuity, a calculation upon which they were not entitled to enter."

We have, in our former brief, pointed out a vital objection to the use of authentic annuity-tables (which,

however, the tables admitted in the case at bar are not shown to be), in that they are based upon a promise of the Government of Great Britain, and their payment with regularity is as certain as any thing can be, humanly speaking. While the annuity for which the jury in the case at bar attempted to give a commutation was one dependent upon the varying vigor, physical and intellectual, of the defendant in error, the condition of business, and innumerable other factors, each one more uncertain than the others. Counsel for defendant in error says:

"The jury could only have calculated the present value by the aid of a table."

This is probably true, and emphasizes our objection that they had no business to make any such calculation, and that therefore they neither needed nor should have had before them the annuity-table, even if it had been accompanied by what in a proper case would have been sufficient authentication.

The cases cited by counsel for defendant in error, on pages 6 and 7 of his brief, do not seem to us to sustain his position. He cites, on page 7, *R. R.* v. *Coates*, *Administratrix*, 15 Am. and Eng. R. R. Cases, 265. In that case the court said, at page 268:

"The plaintiff introduced certain life-tables showing the probable duration of the life of a person of decedent's age."

And in the third paragraph of the head-note to the case it is said:

"In the action to recover damages for causing the death of a brakeman on a railroad, standard life-tables are admissible to show the probable duration of the life of a person of decedent's age, and thus aid in estimating the damages." . . .

There is nothing in these words about annuity-tables, nor a word hinting that even life-tables are admissible when not properly shown to be "standard;" and we have in the case at bar not denied that there are cases holding life-tables admissible upon proper authentication. We have, however, insisted that annuity-tables are not admissible at all, and that the life-tables in the case at bar were not properly authenticated. We have not at hand 46 Vermont, from which counsel for defendant in error cites, on page 7 of his brief, the case of *Fulsome* v. *Concord*, but we are content to leave it to the court to say whether the language quoted by opposing counsel has the remotest reference to annuity-tables.

Opposing counsel implies on page 6 of his brief that the appellate court in *R. R. Co.* v. *Coates, Adm'x*, (*supra*) sent back the case for a new trial because the court below had not admitted both life and annuity-tables in evidence. But inasmuch as Coates, administratrix, the defendant in error, had, as plaintiff below, recovered a verdict for $5,000.00, which the plaintiff in error was seeking to retain, and as she had introduced the life-tables in evidence (see opinion on p. 268), either opposing counsel has been disingenuous or he has been guilty of carelessness in analysis, for certainly Coates, administratrix, would not have been heard to object to the admission of evidence she had herself offered.

THIRD.

Before closing this reply we desire to call the attention of the court to the testimony of R. H. Smith, section-master of the plaintiff in error's railway, who examined the scene of the accident shortly after its occurrence. The theory of plaintiff below having been that the accident which caused his injury was caused by the break-

ing of a rail upon a decayed cross-tie, the condition of which could readily have been detected and remedied by the railway company, the testimony of Mr. Smith tending as it did to show that the fracture of the rail did not occur at a cross-tie, was of the highest importance to plaintiff in error. A careful reading of Mr. Smith's testimony shows him to have been a candid witness, expert in his calling, and capable of lucid statement in an unusual degree. Nothing in the record tends to impeach his credibility or his general character. It is possible that the court below might with propriety have called the attention of the jury to Mr. Smith's employment by the plaintiff in error, but that, though nothing more was called for, was not sufficient. Upon Mr. Smith's testimony the charge of the court below was (see Record p. 9):

"Upon the testimony I charge you as follows: The principal witness for the defendant was a man who was the section-master, that is Mr. Smith. If there was a rotten tie there, and he had overlooked it, he would be strongly tempted to conceal it, and put the fault on some body else, ..."

Is not this equivalent to a charge that Mr. Smith's testimony was unworthy of belief, unless it coincided with the theory of the accident put forth by the plaintiff below? The court was not even contented to weaken the force of Mr. Smith's general testimony, but selected a matter vital to the case, and brought that specially to the minds of the jury as being one touching to which Mr. Smith's testimony could hardly fail to be unreliable. The accident in which plaintiff below suffered injury was caused by the breaking of a rail, and that the fracture occurred in spite of the exercise of due care by the railway company, it endeavored to show in order to a defense to the action. Some of the

testimony for plaintiff below tended to show that the broken rail had at the point of fracture rested upon a decayed cross-tie, the condition of which rendered it insufficient to support the rail, and so caused the fracture. It was also asserted that a defect in the cross-tie of the kind described must have been so open and plain that not to know of and remedy it argued negligence in the railroad company. Mr. Smith's testimony as to the examination he had made of the scene of the accident and the surroundings, thus became particularly important to the defendant below (plaintiff in error here), as tending to prove that the fracture of the rail had not been caused by a rotten cross-tie, and so not by a defect easily discoverable and remediable. But of whatever advantage Mr. Smith's testimony might have been to the plaintiff in error under a proper instruction it was deprived by the intimation of the court below, almost amounting to a direct assertion that Mr. Smith being a servant of the plaintiff in error, and charged with a duty respecting its permanent way, could not be expected to tell the truth about a particular matter. This language of the charge would also naturally have the effect of discrediting with the jury the testimony of Mr. Smith on other points.

For the errors touched upon herein, and in our former brief, and other errors apparent from the record, we ask, that the judgment of the Circuit Court in this cause, be reversed.

Respectfully submitted,

GEO. HOADLY,
EDGAR M. JOHNSON,
EDWARD COLSTON,
Counsel for Plaintiff in Error.

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No 250.

THE VICKSBURG AND MERIDIAN RAILROAD CO.
Plaintiff in Error.

VS.

ISRAEL PUTNAM,
Defendant in Error.

In Error to the Circuit Court of the United States for the Northern District of Georgia.

BRIEF FOR DEFENDANT IN ERROR.

BY

HOKE SMITH,
HIS COUNSEL.

Supreme Court of the United States.

OCTOBER TERM, 1885.

No. 250.

THE VICKSBURG AND MERIDIAN RAILROAD CO.
Plaintiff in Error.

VS.

ISRAEL PUTNAM,
Defendant in Error.

In Error to the Circuit Court of the United States for the Northern District of Georgia.

BRIEF FOR DEFENDANT IN ERROR.

Putnam sued the Plaintiff in error for damages. He was injured on the 15th of September, 1881, while a passenger, between Edwards and Bolton, on the road of Defendant. The accident was at night. A rail broke and the car capsized. Plaintiff was badly injured. He recovered sixteen thousand dollars The presiding Judge refused a new trial.

The bill of exceptions covers alleged errors in the admission of testimony, alleged errors in the charge, and alleged error in the amount of the verdict.

We reply to the bill of exceptions that there was neither error in the admission of testimony nor in the charge.

We futhermore reply that the admitted facts demanded a verdict for Plaintiff, and that even if the court committed error, the error had reference alone to the right of Plaintiff to recover, and the admitted facts justified a much stronger charge in favor of the Plaintiff than the court gave us, namely, a charge instructing the jury to find for the Plaintiff.

EXCEPTIONS TO THE ADMISSIONS OF EVIDENCE

1st. The Defendant objected to the admission of the life table and of the table from Reese's Manual upon the ground that the Plaintiff had not shown a case in which such evidence was admissible, the Plaintiff not having "been killed permanently, or disabled." It will be observed that the objection was not based upon the failure of the Plaintiff to satisfactorily show that the life table was a respectable and ordinarily accepted life table, shown to be such, and to be acted on and consulted by the business men where practicable in the transaction of their own affairs; nor was this objection made to Reese's Manual; the sole ground of the objection was that the Plaintiff had not 'been killed permanently or disabled."

This court will consider, only the objection made to the admissibility of the testimony in the court below.

In the case of Evanson vs. Gunn, 99th U. S., 660 the Supreme Court held that:

"The Defendants having thus specified their objection it must be considered that all others were waived, or that there was no ground upon which others can stand."

The reason of this rule is plain and especially applicable to the present case.

We introduced General Lewis and identified life tables; the testimony at once satisfied counsel for both sides that the tables were the character of tables which the law allows introduced in proper cases; the parties may not have gone fully into detail as to the occupation of General

Lewis or as to the character of his company, for these facts may have been so thoroughly understood between them that it was not deemed necessary. In the preparation of the evidence for the bill of exceptions, the counsel understanding the real point of the objection made, and not desiring to cumber the record, insert only so much of the evidence as is material to the real objection. In either of these cases, to allow any objection to be urged except the one actually stated would be to defeat justice.

Take the case of Reese's Manual introduced in the present case, an examination of the Georgia Reports will show that this table is a calculation of the present value of an annuity of one dollor ($1) per year, for persons of different ages, the calculation being based upon the probable expectancy of life accorded to persons of different ages by the celebrated Carlyle Tables. So constantly has this table been used in Georgia that for the convenience of the bar it is now found published at the end of the decisions in the 70th volume of the Georgia Reports.

A great number of cases in our Supreme Court Reports show that this table was introduced as evidence. No Georgia lawyer can now be found who would ask proof of Reese's Manual; it would show his complete ignorance of the Supreme Court decisions of his own State; therefore, in this case it was offered and not objected to upon the ground tbat counsel defending the road wished proof of what Reese's Manual was, for counsel in the court below had practiced law in Georgia, and were not ignorant of the Georgia decisions. It was objected to upon the sole ground that this was not a proper case for well authenticated life tables..

But it is urged that this was not a case for well authenticated life tables.

What is the object of the introduction of a life table? It is simply to give the jury an idea of what is the reason-

able expectation of life of the persons bringing the suit for damages The tables may or may not be used by the jury; the jury may or may not believe that the injuries are permanent. If the jury believe the injuries permanent, then the tables will be useful. If they do not believe the injuries permanent, then they will discard the tables.

In the case of the Central R. R. vs. Richards, 62 Ga., 307. where suit was brought by a person injured, life tables were held admissible, although not a case of death.

In the case of Johnson vs. The Atlanta & West Point R. R. Co., 66 Ga, 260, life tables were held admissible, and the table in Reese's Manual was held admissible; this was not a case of death caused by the injuries.

Rorer recognizes this rule, and Pierce alone lays down a rule to the contrary. The 49th Iowa, which Pierce cites in support of his views, in the head notes declares that life tables are admissible even in cases where death does not result from the injury.

In McDonald vs. C. & N R R. Co, 26 Iowa, 139, life tables were held admissible in a case similar to the present case.

Dr. Westmoretand had sworn that while he could not state positively what would be the case with Mr. Putnam, yet, that the injuries in such a case as his were apt to be permanent. This was testimony from which the jury could find that the injuries would be permanent, and there was other testimony showing the injuries to be permanent.

3d. Mr. Atwater testified "That he had travelled over Defendant's road twenty-four or twenty-five times. Knows where Edwards is and also Bolton. Witness was asked the condition of the road between Bolton and Edwards when he passed over it. The Defendant objected to the condition of the road, except at the place of the accident. "The witness answered the question stating that

the condition of the road was bad between Bolton and Edwards."

The ground of the Defendant's motion was based upon the idea that testimony could only be admitted showing the condition of the road at the exact spot of the accident. We respectfully submit that such a rule would render it impossible to prove in a railroad accident the condition of the road causing the accident. The portion of the road bed both as to rails and cross-ties might, between two stations, be very defective, so defective that anyone passing over the road would observe the fact; the owners of land adjacent to the track might have noticed it, and this testimony would be very strong to show, if an accident happened, that the accident was due to the defective condition of the rails and road-bed. This testimony would not be remote but pertinent and direct; yet because it was general under the rule invoked by the Plaintiff in error, it would be excluded.

We recognize the correctness of the rule that a defective condition of the road-bed at a particular place other than the place of accident would not be admissible, but that is not this question. The proof shows a defective condition in all of a certain territory; the place of the accident being within the territory. The testimony covers the place of the accident and the fact that the witness can not particularize the place goes to the weight of his testimony, not to the admissibility of his testimony.

The exact question has been ruled in the Misouri Pacific Ry. et al. vs. Collier. 18 American and English Railroad cases, 281.

In Holyoke vs. Grand Trunk Ry., 28 N. H., 541, it was ruled "The Court will not set aside a verdict where the Judge, who tried the case, in his discretion admitted testimony showing the general bad state of Defendant's track for miles distant from the place of accident."

2d. The superintendent's reports were admissible (See Record, p 24). They were the printed reports of the superintendent of the road made in 1877 and 1880 to the board of dir c ors. They were identified by the section master, who also showed that the heaviest part of the traffic of the road in 1877 and 1880 was over the place of the accident. He has identified the broken rails as being those originally put down upon the road, and worn at the time of the accident to a weight of about thirty nine pounds. He had shown that these rails were being removed, and that the Defendant had reached midway, only a quarter of a mile distant, with new heavy rails. The superintendent had testified that no new rails were laid at the exact point of the accident, but that this rail had been in use since he was superintendent.

Mr. Carrington and others had testified that the rail was very old and worn, and liable to give way at any time.

The superintendent's report for 1877 stated that on that portion of the road where the heaviest traffic was done there were thirty-five miles of iron which had been run over for more than thirty five years, and that these rails now weigh about thirty nine pounds to the yard. In 1880 he reported twenty five miles of the track made of the original iron, and recommended that this old rail should be removed at once.

These reports were objected to upon four grounds

1st. Because they were not sworn to.

2d. Because they had no reference to the place of the accident, but only to the general condition of the rails.

3d Because the Defendant could not be charged with the reports as admissions, the statement of its agents not a part of *res gestæ*.

4th. Because the information of the superintendent as to the condition of the road was derived in part from reports of subordinates.

The first and third grounds of the objection will be considered together. The second ground of objection is answered in part by the view presented with regard to the testimony of Atwater, and by the references made to the entire testimony in the case, showing that these reports necessarily had reference to the condition of the road at the place of the accident. It will be remembered in this connection that the declaration alleged notice of the defective condition of these rails at the place of the accident to the board of directors through the annual reports of the superintendent. With this allegation in the declaration, the directors and the superintendent, knowing all the facts, were silent. Their silence is a circumstance which helps to sustain the Plaintiff's testimony in this part of his case.

The fourth objection to these reports is based upon the testimony of Smith, section foreman, who swore that the superintendent inspected the road, and in this way, and from the roadmasters under him, who made reports to him, he got information about the condition of the road.

The particular matter about which he makes the reports introduced was necessarily one which the superintendent would know personally. The fact that the roadmasters under him made reports to him, instead of weakening the argument in favor of this testimony, helps to show a system of reports from the inferior officers, through their superiors, to the board of directors of this company, and thereby tends to show the official character of the superintendent's report.

The first and third objections really are upon but one line, namely, that this was merely the statement of an agent of the Defendant not under oath, and that this statement was not a part of *res gestæ*, and therefore inadmissible.

The idea of counsel was, that no report of a superintendent would be admissible unless it was so closely con-

nected with the accident as to be *res gestæ* to the accident. His exception goes to this point, and to this point alone. But the evidence shows that the reports were *res gestæ* to the work of the superintendent. They were made to the boards of directors for the years 1877 and 1880. They were annual reports of an official character.

The office of superintendent of a railroad is one so well established, and the custom of making annual reports so uniform, that the Court will take judicial knowledge to a great extent of the character of his work.

In Brown et al., vs. Piper, 91 U. S., 42, it was held that the Court would take judicial cognizance "of the general customs and usages of merchants. Courts will take notice of whatever is generally known within the limits of their jurisdiction."

In Terhune vs. Phillips, 99 U. S, 592, it was held that "The Court will take judicial notice of a thing which is in common knowledge and use of the people throughout the country."

In King vs. Gallun, 109 U. S., 99, it was held that "The Court will take judicial knowledge of matters of common knowledge and of things in common use."

The Supreme Courts of Michigan and Nevada have held that Courts will take judicial notice of the duties ordinarily attaching to the office of superintendent. See Adams Mining Co. vs. Center, 26 Mich., 73; Sacalaris vs. Eureka Co., 18 Nev., 155; (51 A. R., 737 and 47 A. R., 201 note.)

The superintendent made the reports to the boards of directors of the company. The reports were official because in the line of his duty, and were admissible.

United States vs. Golding, 12 Wheaton, 470, it was held: "Where the fact of agency has been proved, either expressly or presumptively, the act of the agent, co-extensive with the authority, is the act of the principal, whose mere

instrument he is; and then whatever the agent says within the scope of his authority, the principal says, and evidence may be given of such act and declarations as if they had been done and made by the principal himself."

In 1 Peters, 311, it was held: "A general agent of a manufacturing establishment gave a certificate that a certain amount was due on settlement, from the firm whose agent he was; held to be admissible evidence against his principal, when taken in connection with the fact that the debt was contracted for materials used by him on the manufacture."

In American Fur. Co., vs. United States, 2 Peters, 358, it was held, citing 12 Wend, the principal asserted in the decision of that kind and applied to the case was that: "Whatever an agent does or says, in reference to the business in which he is at the time employed, and within the scope of his authority, is done or said by the principal, and may be proved, as well in a criminal as a civil case, in like manner as if the evidence applied personally to the principal.

In Cliquot's Champagne, 3 Wallace, 115, it was held: "Whatever is done by an agent in reference to the business in which he is at the time employed, and within the scope of his authority, is said or done by the principal, and may be proved as if the principal were the actor and speaker." See also Maleck vs. T. G. & L. R. Co., 57 Mo., 17 and Norwisck & W. R. Co. vs. Cahill, 18 Conn., 484.

Declarations made "In regard to a matter of business then being under the special agency and control of such director or directors are admissible upon the principle that whatever an agent says within the scope of his authority the principal says, and evidence may be given thereof as if they had actually been the words of the principal himself."

1 Rorer on Railroads, 666.

In Kansas Central P. U. P. R. Co. vs. Bateman, 22 Kan., 639, the letters of a superintendent referring and discussing the business of the road were held admissible as admissions of the Defendant.

These reports made to the directors of the company were also admissible as notice to the board of directors of the defective condition of the track; and of the great danger to which they were subjecting those whom they undertook to carry as passengers.

1 Wood's Railway Law, 429, 430, 431, and cases cited.

Counsel for Plaintiff in error before this Court urges three reasons why these reports should not have been admitted. First, that they were not sworn to or proven in anyway to be what they purported. This objection was not the objection made by counsel in the Court below: counsel below objected because the reports were not sworn to under examination Counsel in the Court below made no point upon the fact that the reports were not proven to be what they purported. The sole idea upon this branch of the objection was that they were merely reports of an agent, not the sworn statements of an agent.

The brief of evidence does not go fully into the proof which identified the reports, but on page 28 of the printed record will be found in the testimony of Mr. Smith, the statement that the printed pamphlets of 1877 and 1880 shown to him were the reports of Mr. Raworth, superintendent.

The second objection of counsel comes before this Court is, that the reports were too remote in date to have any bearing on the condition of the Plaintiff in error's road or any part thereof at the time of the accident This point applies rather to the effect than to the admissibility of the evidence. The question would be—take this report in connection with the balance of the testimony in the case, and can the inference fairly be drawn therefrom that

the same rails were in use at the time of the accident which were in use in 1877 and 1880; were they substantially the same rails and ubstantially in the same condition, except that they were worse for wear which they had received between the years of 1877 and 1881. The reports show that the rails had become weak and required the closest attention to prevent accident in 1877. The reports show that in 1880 the rails were almost entirely worn out and that they should be moved at once. The testimony of the superintendent showed that the rails at the place of this accident had not been changed since 1877, and were the same old rails originally used by this company, therefore more remote the time when the superintendent admitted the rails to be defective, the stronger the testimony, because the Court will at least take judicial cognizance of the fact that old worn out rails do not grow strong and new by continuous use.

The third objection by the counsel in this Court is that nothing contained in either of these reports appears to or does touch the single defect which caused the accident wherein Putnam was injured, or even that portion of Plaintiff in error's railway within which the scene of the accident is included. The immediate cause of the accident was the breaking of the rail. The Plaintiff claimed that the rail was defective; that it had been in such constant use for so long a time that to continue to run a train over it all was to fail to use that degree of care which was due to a passenger. The reports showed that all the old rails, in 1877 confined to 35 miles of the road, and in 1880 confined to 25 miles of the road, had become practically useless from constant wear to which they had been subjected, so that the closest attention was necessary to prevent accident, and so that they were almost entirely worn out, and when taken up were fit only for the rolling mill. These old rails and the place where Putnam was hurt were both

where the heaviest traffic was done in 1877 and 1880, and the rails in 1880 were so old that it was necessary to take them up at once and put down new rails, and the rails where Putnam was hurt were so old that the Company was about to take them up and to put down new rails. The report referred to the old rails, and the testimony of the engineer, Herbert, showed that the rails which broke were a portion of the old rails.

The declaration charged that these reports referred to rails which were the same rails as those that broke and injured Putnam, and the superintendent never denied the fact. The superintendent and the Company had the information in their possession. they knew of this evidence, strong in its character, sufficient to create the inference that the rails referred to in the printed reports were the rails which broke and injured Putnam, and with all the information in their possession by their silence they confirmed the inference.

EXCEPTIONS TO THE CHARGE OF THE COURT.

The exceptions are all upon questions of fact, not of law. Therefore, nine of these exceptions which go to the question of right to recover, were all predicated upon the idea that the Judge could not legally express an opinion upon the testimony, as the State practice in Georgia allows no opinion.

The complete reply to the exceptions really intended by counsel is contained in the decisions of this Court, where it has been held: "In this case the Court below, while it commented upon the evidence, but without withdrawing from the jury the determination of the facts, refused to allow the jury to take to their room the written instructions given them. Held, that the act of Congress of June 1st, 1872, has no application to the case, and there was no error in the action of the Court below."

Nudd et al. vs. Burrows, 91 U. S., 426.

This decision was affirmed in Indianapolis vs. Horst, 93 U. S., 291.

It is well established that the Judge presiding in a Circuit Court of the United States can express his opinion upon the evidence.

In Transportation Line vs. Hope, 95 U. S., 302, it was held: "An expression of an opinion simply by a Judge upon a question of fact is not a ground of error."

In 13 Howard, 131, it was held: "The right of a Court of the United States to express its opinion upon the facts in a charge to the jury was affirmed by this Court in 1 Peters, 182, and 14 Peters, 322; nor can it be objected to upon the ground that the reasoning and opinion of the Court upon the evidence may have an undue and improper influence on the minds and judgment of the jury; for an objection of that kind questions their intelligence and independence, qualities which cannot be brought into doubt without taking from that tribunal the confidence and respect which so justly belong to it in questions of fact."

In Magniac vs. Thompson, 7 Peters, 348, it was held: "As to the comments of the Court upon the evidence, it is almost unnecessary to say, after what was said by this Court in Garver vs. Jackson, 4 Peters, 80, 81, that we have nothing to do with them."

The verdict was required by the testimony.

The admitted evidence placed the burden on the Defendant.

47 A. R., 7.

12 A. R., 720.

2 Wood on Railroads, 196.

Stokes vs. Saltonstall, 13 Peters, 181.

Railroad Co. vs. Pollard, 22 Wallace, 341.

A carrier of passengers for hire is bound to observe the utmost caution and is responsible to them for such injuries received in the course of their transportation, as might have been avoided or guarded against by the exercise of extraordinary vigilance aided by the highest skill.

P. R. R. Co. vs. Roy, 102 U. S., 451.

The duty of carriers towards their passengers has been established in the U S. Courts since 13th Peters, and has been repeatedly re-affirmed, and that rule has been fixed to be that the carriage shall be safe if human care and foresight can make it safe. See also 2d Woods Railway Law 1071.

The burden therefore in this was upon the Defendants to show that no human foresight and no human skill could have prevented this accident. With this principal of law in mind, let us consider how the case stood. From the proof it must appear that the accident resulted from one of those unforeseen casualities which human skill and human knowledge could not have prevented. The undisputed testimony was that these rails had been seen in use for many, many years, that they had worn down very much from their former size, that they were so much worn that it had become necessary for them to be taken up in 1875 and cut down to half their length; it was also said that some of the cross ties were rotten in and about the place of the accident, and that the superintendent apologized for the condition of the track, by stating that it had to be run in a most economical way up to the time the Erlanger System took charge; it was absolutely necessary, and the company did not have the ability to do more. The bonded debt was very large and the track had been dismantled during the war, and its income was limited. Rails were being laid from Midway west, and were within a quarter of a mile of the point of the accident, no new rail had been laid at the point of the accident. (See printed record, page 62.) This, now, was the admission of the superintendent. If the fact that a rail had not before broken was a sufficient proof that a rail was good, then a recover could never be had against a carrier until the second accident at the identical place. In this case his testimony furthermore was: "The

track proved to be safe under the proper watch and care, the track was not notoriously bad about where the accident occurred." Now, then, what does his evidence amount to? It admits that the rails were old and worn, it apologizes for their condition on account of the poverty of the road; it admits that new rails were on the point of being laid, it deems that the track was notoriously bad, and claims that the track had proved to be safe under proper watch and care. What does this last statement mean, not that the rails were good rails; not that the rails were safe as even ordinary care would require; but that up to that time they had proved to be safe that is to say they had not yet broken. All he says in their favor is that although old and much worn they had not before broken at this exact spot. His very language is a concession against the Defendant, for he does not pretend that the care which the law required had been taken

Mason Herbert, engineer, swore nothing material except the fact that the old rails on Smith's section were more carefully looked after than on any other section of the old rails; he did not pretend that the rails came up to the standard required by law, or that the cross ties were not defective. Smith, the section master, did claim that from his inspection he reached the conclusion that the rotten cross-tie was not at the place where the rail first broke, and he said that the rails, track and cross-ties, when he rode over them, were, to all appearances, safe, and that there was nothing in the appearance of the track at the time, either in the cross ties or in the rails, that aroused his attention, and that there was no test which he could have applied without taking up the rail and breaking it. He also swore that the rails were the old English rails which had worn down to about 39 pounds, and that he did not know how much of the head of the rail that broke was worn. Now, therefore, to what

does his testimony thus far amount? Simply to this, that he was the section master watching these much worn rails, that they were worn so much that he could not tell how much of the head was gone, that they were reduced to the light weight of 39 pounds, but whether they were sufficiently strong, in their worn condition, to bear the character of engines and the trains which passed over them, he did not pretend to swear; whether reasonable caution would have required the removal of these old rails long before it was done, Smith did not pretend to know; he discussed crystallization, presenting views of crystallization superinduced by electricity, magnetism and other causes, producing disintegration of iron fiber, but even with his great learning on this subject, learning superior to known science, it will be seen from that portion embodied in the bill of exceptions (see page 20) that he did not pretend to claim that crystallization broke this rail.

The Defendant failed entirely to introduce proof to relieve it of the presumption of negligence which the law places upon it, and Judge McCay could properly have directed a verdict for Plaintiff, leaving only the amount of recovery to be fixed by the jury.

Ames vs. Quimby, 106 U. S., 342.

The Belgenland, 114 U. S., 355.

Orleans vs. Platt, 99 U. S., 676.

The burden being upon the Defendant, and the Defendant not having removed the burden which the law placed upon it, the Court should have directed the verdict against the Defendant.

Commissioners of Marion County vs. Clarke, 94 U. S., 278

Schofield vs. Chicago & St. Paul Ry., 114 U. S., 618.

Pleasants vs. Fant, 22 Wallace, 116.

Pence vs. Langdon, 99 U. S., 578.

Herbert vs. Butler, 97 U. S., 319.

No legal charge could have changed the result.

Decatur Bank vs. St. Louis Bank, 21 Wallace, 294.

A contrary verdict would have been set aside.

Phœnix Ins. Co. vs. Doster, 106 U. S., 32.

The Court could direct a verdict for the Plaintiff.

Hendricks vs. Lindsay, 93 U. S., 143.

None of the alleged errors in this case can be fairly claimed to have done the Plaintiff in error any harm, and for that reason this Court will not interfere with the verdict.

115 U. S, 227.

We come now to that portion of the charge which deals with the measure of damages. Two exceptions are made by the Plaintiff in error to the charge in this respect. The first of these exceptions is the charge substantially given to the effect that, for time lost on account of the injuries, the presumption was Defendant in error lost his pay and for this he could recover.

We recognize the fact that the actual loss is the basis of compensation, but this rule does not prevent the Plaintiff from recovering where the result of the injury is to place upon him a liability.

First Sedgewick on Measure of Damages, 485, is as follows :

"There would be neither wisdom or justice in compelling the Defendant to pay the Plaintiff as compensation for a loss which he has not incurred and may never sustain. These remarks of course do not apply where a liability is attached that may fairly be regarded as inevitable and sure to be responded to by tne party charged."

Judge McCay followed this view. He held that the loss of time freed the company for whom Mr. Putnam was working from liability for Mr. Putnam's salary during the time Mr. Putnam did not work, and that as Mr. Putnam was legally charged in settlement with the insur-

ance company for his loss of time, he had the right to collect for the same time out of the railroad. The declaration proceeded upon the same idea. It claimed that his time had been lost on account of the injury and that he was entitled to recover the value of the lost time. It did not say that the company failed to pay him for this time, but when the declaration showed that Mr. Putnam was unable to work, and when the evidence sustained the declaration by showing that he did not work, he certainly had made out a case to entitle him to the value of his lost time, for he was liable in final settlement with the insurance company for the time he was laid up from the accident.

The second exception to the charge is, "The Company is bound to give him an annuity of the amount he has been damaged by the year for a period equal to the expectation of Plaintiff's life."

An annuity is a sum payable yearly for a certain number of years. The amount he has been damaged by the year is the amount he has lost for each year during his life from the injuries. This yearly loss was chargeable to the injuries which the Defendants inflicted, and was properly recoverable, it being a sum due by the year in future, it was an annuity. The younger plaintiff was, the longer he would probably live, and the more times his annuity would be paid. As the annuity would be paid cash, the present value of the annuity had to be found, and this sum was the actual damage so far as future financial loss was concerned.

The cautions given by the Court were to prevent error against the Defendant. But for the explanation that the present value of the annuity alone could be recovered, the jury would most probably have multiplied the loss per year by the number of years, thereby greatly increasing the verdict.

Before his injury Mr. Putnam was making--

Salary	$3,000
Adjusting	850
Profits	500
Net income	$4,350

Since his injuries he is able to make--

Salary	$2,100
Local business	1,200
Adjusting	450
	$3,750
Expenses	1,500
Net income	$2,250

Before the injury his expenses were paid by his employers.

Before the injury	$4,350
Since the injury	2,250
Loss per year	$2,100

The injuries have compelled Mr. Putnam to abandon the business of General Manager, and to give his attention to the work of a local agent. The pay of the latter is not half so much as that of the former. He was still able to do only one-half the outdoor work which he did before, could not do of any work by a great deal what he could do before. He still suffered pain in bad weather. His injuries had been improving. He had gradually been getting relief, but he never expected to get entirely well.

Dr. Westmoreland swore that injuries in cases like the Plaintiff's were apt to be permanent; sometimes they are better, sometimes worse. Which of these directions it would take in Mr. Putnam's case, he could not tell.

Then Dr. Westmoreland left him with his then condition as above described, and with a future uncertain; which might be better, which might be worse, and with injuries apt to be permanent.

Under this evidence he may by this time be unable to earn the $2,250; his injuries growing worse, he may now be making nothing—a loss of $4,350 per year. From all of this the jury was left to reach a conclusion; taking the probabilities into consideration, they must have fixed his average loss at about $1,250 per year. To this they added a fair compensation for pain and suffering, and his doctors' bill and other expenses.

ERRORS IN RECORD.

The point is made that the judgment antedates the verdict. The exceptions are to the alleged errors including the verdict. No exception is taken to the fact that the judgment was entered before the verdict. The judgment can be amended by correction of the date.

But in point of fact the verdict was rendered on April 28th. The record shows that it was rendered on that day, and we now present to the Court a certificate from the Clerk showing that the date really is April 28th.

Respectfully submitted.

HOKE SMITH,
Counsel for Defendant in Error.

118-5-45

JUL 10 1886
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States.

(OCTOBER TERM, 1886. No. 17.)

OCTOBER TERM, 1886.

No. 17.

THE VICKSBURG AND MERIDIAN RAILROAD CO.,
Plaintiff in Error,
vs.
ISRAEL PUTNAM,
Defendant in Error.

In Error to the Circuit Court of the United States for the Northern District of Georgia.

SUPPLEMENTAL BRIEF FOR DEFENDANT IN ERROR.

HOKE SMITH,
FOR DEFENDANT.

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The printed brief which I have furnished is not full upon the last exception to the charge of Judge McCay. I had never supposed that this exception would be seriously urged. But since the argument on yesterday, I consider it due to the case to call attention a little more fully to the charge in connection with this last exception.

"The company is bound to give an annuity of the amount he has been damaged by the year for a period equal to the expectation of the plaintiff's life."

1st. It is clear from the language used, from the language following, and the language preceding this exception, that Judge McCay intended for the jury to only allow as an annuity the sum which they had already found to be

the actual damage per year during the whole of the life of Mr. Putnam, and that he did not mean for them to take the amount of the damage for the year just after the injury, and allow that sum as an annuity during the entire life of the plaintiff.

"The amount he has been damaged by the year," means the sum determined upon from the whole evidence as the average loss to Mr. Putnam, during the number of years which he will actually live, taking all the testimony into consideration. The language does not mean the amount he has been damaged for the one year just before the verdict, for "by the year" means an average of a number of years. It indicates the contemplation of a sum found from the comparison of many years. This construction of the language excepted to brings it to the true rule mentioned by Justice Bradley for the computation of damages.

By going back to the foot of page 11 of the Record, the following language will be found:

"Then find how much he is damaged every year, and then find out from the table which you will have out before you how much one dollar of annuity to the end of his expectation is worth and multiply them together."

It will be observed that this language is substantially the same as the language excepted to. In the one case "damaged by the year" is used, and in the other "damaged every year" is used. These terms are practically synonymous. Immediately after using "damaged every year", Judge McCay gave jury the many uncertainties incident to life, together with the uncertainties as to the permanency of the injury which were to be considered in determining how much Mr. Putnam was "damaged every year"; and this explanation already given with regard to "damaged every year" applied also to "damaged by the year"; and the amount he was "damaged by the year" was therefore, under the charge, to be decided upon with all of

the uncertainties of life, and with the uncertainties of the injuries, fully to be considered by the jury.

Judge McCay called the jury's attention to the uncertainties of human income and to the uncertainties of the extent of the injuries received by Mr. Putnam (see Record, p. 12). He also told the jury that they "must take the whole thing together." These instructions were equally applicaple to "damaged by the year", and under them the jury was to find the average amount of Putman's loss per year.

2nd. Judge McCay used the following language:

"Sometimes an injury is a benefit to a man. I had a conversation with the superintendent of a blind asylum, and he told me of a man in Lowndes county, who met with an accident and was made blind by it. He was a rather worthless chap, but they sent him to the asylum and he learned to make useful things, and he went back to Lowndes county and he has got quite well off. *You must only average it.* A man who makes a good deal of money one day may get to be a drunkard, or his whole business may break down, as is often the case, his mode of life may change, he may be engaged in making hoops, for instance, and in two or three years hoops may go out of fashion and all the concerns go out with them."

The object of this charge was to let the jury understand that in determining what Mr. Putnam was "damaged every year" or "damaged by the year," too much weight should not be given to his income prior to the accident, and that it would not be proper for the jury to suppose that during his entire life Mr. Putnam would have been able to continue to make what he was then earning. Adjusting business might go out of fashion, and in that way, among others, his income might have been lessened, even though the injury had not been received.

In referring to the man at the blind asylum, Judge McCay meant to tell the jury that it would not do to consider Mr. Putnam's inability at the time of the trial as a fixed standard by which to estimate his loss per year; for

it sometimes happened that injuries increased the income of the person injured, contrary to all expectation. When he said, "you must average it," he put before the jury the uncertainty that Mr. Putnam would have been able, if not injured, to keep his income at its then figure, and the uncertainty that Mr. Putnam would not increase his income after the injury, beyond the figures which the proof at the time of the trial showed.

3rd. Judge McCay used the following language:

"He may be damaged more or less; next year he may be better. This is only one mode of arriving at it. You must take the whole thing together. He may get well. * * * Try to do what is just and right between these parties. * * * You cannot be accurate, as this kind of damage you can only approximate."

By this he told the jury that in fixing what Mr. Putnam was "damaged every year" or "damaged by the year", that his damage might not be permanent, that he might get well, and the due allowance should be made and reduction had on account of that fact.

The effect of Judge McCay's charge was to tell the jury to find an average amount per year which Mr. Putnam would lose during his entire life. The average was to be obtained from what he had earned before his injury, what he had earned since his injury, and what he might earn in the future, properly reduced on account of the fact that Mr. Putnam might have been unable, even if not injured, to keep his income at its former figures, and on account of the fact that Mr. Putnam might get well, and might in a year or two cease to loose anything at all. The present value only of this average yearly sum, was to be allowed.

The amount found in this way as his average damage per year would be the actual loss during his entire life. If the jury thought it would be two thousand dollars per year for ten years, and that Mr. Putnam would have lived twenty years, the average under this charge would have been a

loss of one thousand dollars per year, for the loss having continued through but ten years, and the life being expected to last twenty years, the average loss per year would be the amount of the loss for the ten years divided by twenty, the number of years during which the average was to be made. This was the effect of the charge, and it was certainly right. #

4th. By reference to page 19, of my printed brief, it will be seen that the estimate made by Mr. Putnam of his loss for the year of the trial, and for the year after the trial, was $2,100 per year; his loss for the year prior to the trial was $3,100. Now, if the jury had misunderstood the portion of Judge McCay's charge excepted to they would have allowed Mr. Putnam $2,100, multiplied by 10.823, the present value of one dollar, which would have given him $22,728.30, and to this would still have been added physicians bills and compensation for pain and suffering and deformity, which would have given a verdict of from $25,000 to $30,000.

Therefore I most respectfully insist that the language used did not mean what counsel in the court above contended, that the preceding and following language showed the real meaning of Judge McCay, *and that the verdict of the jury proved they did not misunderstand him.*

5th. On page 13, (between pages 28 and 29 marginal reference), after the use of the language excepted to, Judge McCay used the following language: "Add that to the present worth of the annuity *if you find he was damaged.*" In the use of the words "if you find he was damaged," Judge McCay left the jury with the right to find that the plaintiff was entitled to no annuity at all; for he made the annuity dependent upon the fact that the plaintiff was so damaged as to deserve an annuity.

Judge McCay has already used in reference to a calculation, based upon an annuity, the following language:

The charge did not require the jury to fix the damages by averaging the loss for the year, deducting maintenance, therefrom made for the year when there was no damages & adding the loss of $3,100 for the year actual damage this loss 2100 & 3100 for each year

"This is only one mode of arriving at it. You must take the whole thing together. He may get well."

We, therefore, confidently urge, 1st. That the language used by Judge McCay gave a way to use the tables which would have been right even though the damages were not permanent. 2nd. That the charge really meant for the jury only to use the tables, and allow the present value of annuity in case they found that the plaintiff was permanently damaged.

6th. The point which was being pressed by the counsel in the court below was, that an annuity table could never be used except in cases of death. I ask the attention of the court to the case 15th, American and English reports, 265, where the following language is found in the head note:

"In the above case the court instructed the jury that the measure of damages was such a sum not exceeding the amount claimed as they should find from the testimony would compensate for the loss sustained. Held, that the instruction should have been more explicit in defining the measure of damages."

Now the ruling of the court in the case just quoted is one where the court below refused to allow the use of an annuity table and turned the jury loose upon the question of damages. This was the point made by the counsel below. They wished the jury left without restraint or suggestion from annuity or life tables. They did not misunderstand Judge McCay, but they made this exception upon the idea that annuity tables could not be used at all, and this is the real question made by the exception. To have followed the wish of defendant's counsel would have been clear error; for it would have left the jury with no sufficient guide as to the amount of damages.

Counsel for the plaintiff cites L. R. 8th. Exchequer 221. I beg to call attention to the fact that the opinion of Judge Brett was a dissenting opinion, and the opinion of the

majority of the court is found in the following head note:

"Held, that the witness was competent to give evidence as to the probable duration of life and the practice of annuity. Although not an actuary and that the evidence was revelent and properly admitted."

The court furthermore held "that the direction as to the mode of calculating the damages recoverable by the widow and children might be construed as meaning that the probable duration of life of a person of the same age, and in the same circumstances as the deceased, was an element to be taken into the calculation of the jury with the rest of the evidence, and being so construed was correct."

Now the effect of this decision was to hold that the instruction with regard to the annuity table was correct, the Court having in another part of the charge explained to the jury the elements of doubt to be applied to the findings.

In Fulsome *vs.* Concord, 46 Vt., p. 135, the following language is found: "The Court charged the jury in respect to prospective damages, that they should reduce the losses which the plaintiff would thereafter suffer from loss of time, doctoring and personal suffering to their present worth, or to such a sum as, being put at interest, would amount to the sum they found the plaintiff would lose in the future by reason of the injuries. Held, no error."

It was the idea that the present value of the damages must be calculated, and the plaintiff allowed to recover only the present value of his losses, that Judge McCay was presenting to the jury, in the portion of the charge excepted to. The jury could only have calculated the present value by the aid of a table.

I most earnestly insist that the language used was correct, that the jury was not misled by it, and that the defendant having in no respect suffered damages the judgment should be affirmed.

HOKE SMITH,
Attorney for Putnam.

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The court furthermore held "that the direction as to the mode of calculating the damages recoverable by the widow and children might be construed as meaning that the probable duration of life of a person of the same age, and in the same circumstances as the deceased, was an element to be taken into the calculation of the jury with the rest of the evidence, and being so construed was correct."

Now the effect of this decision was to hold that the instruction with regard to the annuity table was correct, the Court having in another part of the charge explained to the jury the elements of doubt to be applied to the findings.

In Fulsome *vs.* Concord, 46 Vt., p. 135, the following language is found: "The Court charged the jury in respect to prospective damages, that they should reduce the losses which the plaintiff would thereafter suffer from loss of time, doctoring and personal suffering to their present worth, or to such a sum as, being put at interest, would amount to the sum they found the plaintiff would lose in the future by reason of the injuries. Held, no error."

It was the idea that the present value of the damages must be calculated, and the plaintiff allowed to recover only the present value of his losses, that Judge McCay was presenting to the jury, in the portion of the charge excepted to. The jury could only have calculated the present value by the aid of a table.

I most earnestly insist that the language used was correct, that the jury was not misled by it, and that the defendant having in no respect suffered damages the judgment should be affirmed.

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